



FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

THIS IS THE END OF MUR # 464

Date Filmed 1/2/80 Camera No. --- 2

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November 21, 1979

MEMORANDUM TO: Marge Emmons
FROM: Elissa T. Garr
SUBJECT: MUR 464

Please have the attached General Counsel's Report on
MUR 464 distributed to the Commission on a 48 hour tally
basis.

Thank you.

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RECEIVED
OFFICE OF THE
COMMISSION SECRETARY

BEFORE THE FEDERAL ELECTION COMMISSION
November 16, 1979

9 NOV 21 A10: 27

In the Matter of)
)
Stephen Elko)
George Young)
) MUR 464(77)

GENERAL COUNSEL'S REPORT

I. BACKGROUND

This matter was internally generated based on a newspaper article which appeared in the November 1, 1977, edition of The Washington Post. The article reported that a Justice Department memorandum made public in Los Angeles alleged that Stephen Elko, former aide to Congressman Daniel Flood (D-Pa.), and Elko's associate, a Ms. Patricia Brislin, received \$25,000 in cash "campaign contributions" from a George Young. The "campaign contributions" were reportedly given in exchange for helping to secure government financing for Mr. Young's vocational school in Wilkes-Barre, Pennsylvania. The payments were said to have been made in 1972. The article reported that a spokesman for Mr. Flood said that the Congressman "doesn't even know George Young." A review of the 1972 disclosure reports filed by the Flood Committee did not reveal contributions from a George Young.

The question raised by the article was whether the reported actions of Mr. Young, Mr. Elko and Ms. Brislin in 1972 constituted political contributions by government

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contractors and the knowing solicitation of such contributions in violation of 18 U.S.C. § 611, which was in effect at that time. The existing law which parallels the old § 611 is 2 U.S.C. § 441c(a).

We recommended that the Commission defer taking any formal action in this matter pending a review of Justice Department documents. This recommendation was approved by the Commission on February 23, 1978. The Justice Department memorandum which was referred to in The Washington Post article was subsequently received and reviewed by this office.

On May 18, 1978, the Commission voted to "take no further action at this time in this matter." The Commission's determination was made pursuant to two considerations: 1) the Memorandum of Understanding between the Department of Justice and the Federal Election Commission regarding ongoing Justice Department investigations; and 2) the amount of time which had transpired since the alleged violation which occurred in 1972. The ongoing Justice Department investigation of Congressman Flood and Stephen Elko was noted in the General Counsel's report, as was the three year statute of limitations set forth in 2 U.S.C. § 455.

Earlier this year, the Justice Department's case against Congressman Flood went to trial, and on February 3, 1979,

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the trial ended in a mistrial due to a deadlocked jury. Mr. Elko, who had received immunity from the Justice Department, served as a key government witness. An outgrowth of that trial was Pre-MUR 27. Pre-MUR 27, which was based on a newspaper report in the January 31, 1979, edition of The Washington Star, concerned testimony at the first Flood trial that Elko had made cash deposits into Flood's 1973 and 1975 campaign accounts. The Pre-MUR was merged with MUR 464 on February 23, 1979.

On May 21, 1979, this office advised the Commission that a second trial was scheduled to begin on June 4, 1979, and that we had been assured by the Justice Department attorney who prosecuted the first case that there was testimony in the first trial which indicated that some of the cash payments listed in the indictments were designated as campaign contributions.

We recommended, and the Commission decided, that this matter should be kept open because the issue of campaign contributions was likely to arise again in Congressman Flood's retrial but that the Commission would take no further action at that time pending the outcome of the Justice Department's criminal prosecution of Congressman Flood.

Since the last Commission action, Congressman Flood's retrial was postponed due to Flood's poor health. Bernie Panetta, the Justice Department attorney now responsible for

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prosecuting the case, has advised us that Flood is asserting that he is incompetent to stand trial and that he will soon be entering a hospital for a determination of his competency.

II. LEGAL ANALYSIS

We believe that this matter should be closed, due to the Justice Department's continuing proceeding, the time which has passed since the occurrence of the alleged violations and the Justice Department's extension of government immunity to Elko.

At the outset, it is significant to note that the events which are the subject of this matter were discovered by the Justice Department in the course of a criminal investigation. The Commission's involvement is the result of this internally generated MUR, based on newspaper articles concerning the Justice Department's proceedings. Since opening this MUR, however, the Commission has twice decided not act. These decisions were based on the Commission's Memorandum of Understanding with the Justice Department (which serves as a guide for the enforcement of the Department's and the Commission's statutory duties) and in light of the amount of time which had passed since the violations allegedly occurred. The second time the Commission decided not to act was in May 1979, when Congressman Flood's retrial was scheduled to begin within several weeks. The Commission

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voted to take "no further action at this time pending the outcome of the Justice Department's criminal prosecution of Congressman Flood." The retrial has since been delayed for over six months and as the parties are now embarking on a battle over Flood's competence to stand trial, further delay seems inevitable. Under the best of circumstances, it seems unlikely that the trial will begin much before the end of the year and if Flood is found to be incompetent, the trial could be delayed indefinitely. While we continue to believe the Commission should not pursue this matter until after the Justice Department has completed its criminal prosecution of Congressman Flood, we also recognize that further delay on top of the already extended period which has passed since the events occurred would intensify the already existing obstacles to our successfully investigating and pursuing this matter. See, e.g., the April 28, 1978, General Counsel's Report at 2-3. Considering all the circumstances, we believe the Commission should close this matter.

An additional reason for closing this matter is the Justice Department's grant of immunity to Elko. The Justice Department granted Elko immunity as a government witness in its investigations and Elko has served

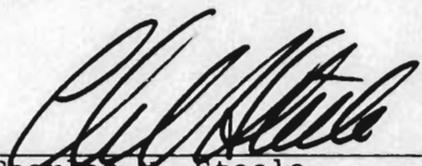
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as a key government witness in Flood's first trial and in the trial of Dr. Head. While it is questionable that Elko's status as an immunized government witness would preclude civil enforcement of our Act, we believe that in light of the Commission's Memorandum of Understanding with the Justice Department and in the interest of facilitating criminal investigations, no further action should be taken by the Commission.

RECOMMENDATION

We recommend that the Commission take no further action and close this matter.

20 November 1971
Date



Charles N. Steele
Acting General Counsel

80010172705

May 21, 1979

MEMORANDUM TO: Marge Emmons
FROM: Elissa T. Garr
SUBJECT: MUR 464

Please have the attached Memo distributed to the
Commission on a 48 hour tally basis.

Thank you.

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RECEIVED
OFFICE OF THE
COMMISSION SECRETARY



FEDERAL ELECTION COMMISSION

79 MAY 21 P 3: 37

1325 K STREET N.W.
WASHINGTON, D.C. 20463

May 21, 1979

MEMORANDUM TO: The Commission

FROM: William C. Oldaker
General Counsel

SUBJECT: MUR 464 (Elko)

DATE: May 17, 1979

This matter was initiated by a newspaper article on November 1, 1977, in the Washington Post. The article reported that a Justice Department memorandum made public in Los Angeles alleged that Stephen Elko, former aide to Congressman Daniel Flood (D-Pa.) and Elko's associate, a Ms. Patricia Brislin, received \$25,000 in cash "campaign contributions" from a Mr. George Young. The "campaign contributions" were reportedly given in exchange for helping to secure government financing for Mr. Young's vocational school in Wilkes-Barre, Pennsylvania. The incident was said to have occurred in 1972. The article reported that a spokesman for Mr. Flood said that the Congressman "doesn't even know George Young." A review of 1972 disclosure reports filed by the Flood Committee revealed no contributions listed as coming from a George Young.

The question raised by the article was whether the reported actions of Mr. Young, Mr. Elko, and Ms. Brislin in 1972 constituted violations of the prohibition against political contributions by government contractors and the knowing solicitation of such contributions pursuant to 18 U.S.C. § 611 which was in effect at that time. The existing law which parallels the old § 611 is 2 U.S.C. § 441c(a).

Because of the dearth of facts surrounding this incident, we recommended to defer taking any formal action in this matter pending a review of Justice Department documents. This recommendation was approved by the Commission on February 23, 1978. The Justice Department memorandum which was referred to in the Washington Post article was subsequently received and reviewed by this office.

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On May 18, 1979, the Commission voted to "take no further action at this time in this matter" as was recommended in our second General Counsel's report. The Commission's determination was made pursuant to two considerations: 1) the memorandum of understanding between the Department of Justice and the Federal Election Commission regarding ongoing Justice Department investigations; and 2) the amount of time which had transpired from the date of the alleged violation which occurred in 1972. The ongoing Justice Department investigation of Congressman Flood and Stephen Elko was noted in the General Counsel's report as was the three year statute of limitations set forth in 2 U.S.C. § 455.

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Since this last Commission action, Mr. Elko has served as a key government witness in the criminal trial involving his former employer, Congressman Flood. The first trial involving the Justice Department and the Congressman ended in a mistrial on February 3, 1979, due to a deadlocked jury. A telephone conversation with Mark Tuohey, the Department of Justice attorney who prosecuted the case, confirmed newspaper reports that a second trial has been scheduled to begin on June 4, 1979.

A copy of the Grand Jury indictment of Congressman Flood for conspiracy and bribery (United States v. Daniel J. Flood, United States District Court for the District of Columbia, Criminal Action 78-00543) alleges overt acts of receiving cash payments from April, 1971, to January, 1978. Many of these cash payments are listed as being initially received by Stephen Elko and then delivered to Daniel Flood (see Attachment I). The indictment, however, does not mention a specific \$25,000 payment from George Young to Stephen Elko, the transaction referred to in the Washington Post which initially gave rise to this matter. Also, the grand jury indictment for conspiracy and bribery fails to mention "political contribution" or "campaign contribution." Mr. Tuohey has assured us, however, that there was testimony in the first trial which indicated that some of the cash payments listed in the indictments were designated as campaign contributions.

Because the issue of campaign contributions is likely to arise again in the second trial of Congressman Flood, we recommend that this matter be kept open. However, due to the Justice Department's involvement in a second criminal trial on issues which relate to campaign financing and contributions, and in light of our Memorandum of Understanding with Justice (see Attachment II), we also recommend taking no further action at this time pending the outcome of the Justice Department's criminal prosecution of Congressman Flood.

administration to award contracts, grants and funds to organizations associated with Rabbi Pinter.

→ OVERT ACTS

14. To effect the object of this conspiracy the defendant DANIEL J. FLOOD and unindicted co-conspirator Stephen B. Elko committed and caused to be committed the following overt acts in the District of Columbia and elsewhere:

a. In or about September 1970, DANIEL J. FLOOD met with Stephen B. Elko in the District of Columbia.

b. In or about April 1971, Stephen B. Elko received \$5,000 in cash from Dr. Murdock Head which was delivered to DANIEL J. FLOOD in the District of Columbia.

c. In or about September 1971, Stephen B. Elko received \$1,000 in cash from Dr. Murdock Head which was delivered to DANIEL J. FLOOD in the District of Columbia.

d. In or about November 1971, Stephen B. Elko received \$5,000 in cash from Dr. Murdock Head which was delivered to DANIEL J. FLOOD in the District of Columbia.

e. In or about March 1972, Stephen B. Elko received \$5,000 in cash from Dr. Murdock Head which was delivered to DANIEL J. FLOOD in the District of Columbia.

f. In the spring of 1972, DANIEL J. FLOOD caused William Fred Peters to pay Stephen B. Elko \$5,000 in cash in the District of Columbia, a portion of which was delivered to DANIEL J. FLOOD in Wilkes-Barre, Pennsylvania.

g. Between spring 1972 and January 1973, DANIEL J. FLOOD did cause Deryl Fleming to pay to him \$1,000 in the District of Columbia.

h. In or about June or July 1972, DANIEL J. FLOOD received \$5,000 in cash from William Fred Peters in the Middle District of Pennsylvania.

i. In or about September 1972, Stephen B. Elko received \$5,000 in cash from Dr. Murdock Head which was delivered to DANIEL J. FLOOD in the District of Columbia.

j. In or about November 1972, DANIEL J. FLOOD caused T. Newell Wood to give him 100 shares of First Valley Bank stock within the Middle District of Pennsylvania.

k. In 1972, DANIEL J. FLOOD caused Dr. James Carper to pay Stephen B. Elko \$7,000 in cash which was delivered to DANIEL J. FLOOD in the District of Columbia.

l. In or about February 1973, Stephen B. Elko received \$5,000 in cash from Dr. Murdock Head which was delivered to DANIEL J. FLOOD in the District of Columbia.

m. In or about September 1973, Stephen B. Elko received \$1,000 in cash from Dr. Murdock Head which was delivered to DANIEL J. FLOOD in the District of Columbia.

n. In or about December 1973, Stephen B. Elko received \$4,000 in cash from Dr. Murdock Head which was delivered to DANIEL J. FLOOD in the District of Columbia.

o. In or about June 1974, DANIEL J. FLOOD caused Gary Frink to pay Stephen B. Elko \$1,500 in cash which was delivered to DANIEL J. FLOOD in the District of Columbia.

p. In or about August 1974, Stephen B. Elko received \$1,000 in cash from Dr. Murdock Head which was delivered to DANIEL J. FLOOD in the District of Columbia.

q. In or about September 1974 DANIEL J. FLOOD caused Gary Frink to pay Stephen B. Elko \$1,500 in cash which was delivered to DANIEL J. FLOOD in the District of Columbia.

r. In or about October or November 1974, DANIEL J. FLOOD caused Robert Gennaro to give Stephen B. Elko checks totaling \$3,000 which were delivered to the account of DANIEL J. FLOOD in the Middle District of Pennsylvania.

s. In or about November 1974, DANIEL J. FLOOD caused Robert Gennaro to pay DANIEL J. FLOOD \$2,000 in cash in the Middle District of Pennsylvania.

t. Between on or about September and November 1974, in the District of Columbia and elsewhere, DANIEL J. FLOOD caused Stephen B. Elko to solicit, demand and exact from Robert Gennaro a promise to pay DANIEL J. FLOOD \$10,000.

u. In or about April 1975, Stephen B. Elko received checks totaling \$1,000 from Rabbi Lieb Pinter which were delivered to DANIEL J. FLOOD in the District of Columbia.

v. Between April or May 1977, DANIEL J. FLOOD caused Rabbi Lieb Pinter to pay Stephen B. Elko approximately \$1,500 in cash which was delivered to DANIEL J. FLOOD in the District of Columbia.

w. In or about October 1975, DANIEL J. FLOOD caused Rabbi Lieb Pinter to pay Stephen B. Elko approximately \$1,500 in cash which was delivered to DANIEL J. FLOOD in the District of Columbia.

x. In or about December 1975, DANIEL J. FLOOD caused Rabbi Lieb Pinter to give DANIEL J. FLOOD a check in the amount of \$1,000 in the Southern District of New York.

y. In or about January 1978, DANIEL J. FLOOD caused Rabbi Lieb Pinter to pay Stephen B. Elko approximately \$1,500 in cash which was delivered to DANIEL J. FLOOD in the District of Columbia, all in violation of Sections 201 and 2 of Title 18, United States Code.

SECOND COUNT

In or about December 1973, in the District of Columbia, defendant DANIEL J. FLOOD, being a public official, that is a United States Congressman, did unlawfully, willfully, knowingly, and corruptly, directly and indirectly, ask, demand, exact, solicit, seek, accept, receive, and agree to receive a thing of value for himself, to wit: \$4,000 from Murdoch Head in return for being influenced in his performance of official acts, to wit: attempting to influence, directly and indirectly, departments, agencies, officials of the Executive Branch of the United States Government, including officials of the United States Department of Health, Education and Welfare and the United States Agency for International Development to award sole source contracts, grants, and funds to Airlie Foundation and the George Washington University

Attachment II
MUR 464

-2-

PRACTICE OR PATTERN, PRIOR NOTICE, AND THE EXTENT OF THE CONDUCT IN TERMS OF GEOGRAPHIC AREA, PERSONS, AND MONETARY AMOUNTS AMONG MANY OTHER PROPER CONSIDERATIONS.

3) WHERE THE COMMISSION DISCOVERS OR LEARNS OF A PROBABLE SIGNIFICANT AND SUBSTANTIAL VIOLATION, IT WILL ENDEAVOR TO EXPEDITIOUSLY INVESTIGATE AND FIND WHETHER CLEAR AND COMPELLING EVIDENCE EXISTS TO DETERMINE PROBABLE CAUSE TO BELIEVE THE VIOLATION WAS KNOWING AND WILFUL. IF THE DETERMINATION OF PROBABLE CAUSE IS MADE, THE COMMISSION SHALL REFER THE CASE TO THE DEPARTMENT PROMPTLY.

→ 4) WHERE INFORMATION COMES TO THE ATTENTION OF THE DEPARTMENT INDICATING A PROBABLE VIOLATION OF TITLE 2, THE DEPARTMENT WILL APPRISE THE COMMISSION OF SUCH INFORMATION AT THE EARLIEST OPPORTUNITY.

WHERE THE DEPARTMENT DETERMINES THAT EVIDENCE OF A PROBABLE VIOLATION OF TITLE 2 AMOUNTS TO A SIGNIFICANT AND SUBSTANTIAL KNOWING AND WILFUL VIOLATION, THE DEPARTMENT WILL CONTINUE ITS INVESTIGATION TO PROSECUTION WHEN APPROPRIATE AND NECESSARY TO ITS PROSECUTORIAL DUTIES AND FUNCTIONS, AND WILL ENDEAVOR TO MAKE AVAILABLE TO THE COMMISSION EVIDENCE DEVELOPED DURING THE COURSE OF ITS INVESTIGATION SUBJECT TO RESTRICTING LAW. WHERE THE ALLEGED VIOLATION WARRANTS THE IMPANELING OF A GRAND JURY, INFORMATION OBTAINED DURING THE COURSE OF THE GRAND JURY PROCEEDINGS WILL NOT BE DISCLOSED TO THE COMMISSION, PURSUANT TO RULE 6 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

WHERE THE DEPARTMENT DETERMINES THAT EVIDENCE OF A PROBABLE VIOLATION OF TITLE 2 DOES NOT AMOUNT TO A SIGNIFICANT AND SUBSTANTIAL KNOWING AND WILFUL VIOLATION (AS DESCRIBED IN PARAGRAPH 2 HEREOF), THE DEPARTMENT WILL REFER THE MATTER TO THE COMMISSION AS PROMPTLY AS POSSIBLE FOR ITS CONSIDERATION OF THE WIDE RANGE OF APPROPRIATE REMEDIES AVAILABLE TO THE COMMISSION.

February 23, 1979

MEMORANDUM TO: Marge Emmons
FROM: Elissa T. Garr
SUBJECT: Pre MUR 27

Please have the attached Memo distributed to the
Commission on a 48 hour tally basis.

Thank you.

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FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

RECEIVED
OFFICE OF THE
COMMISSION SECRETARY

79 FEB 23 P 3: 15

February 23, 1979

MEMORANDUM TO: The Commission
FROM: William C. Oldaker
General Counsel *W. Oldaker*
SUBJECT: Pre MUR 27

This pre MUR was initiated by a newspaper article on January 31, 1979 in The Washington Star. The article was written in connection with the recent trial of Representative Daniel J. Flood (D-Pa.). Representative Flood was charged with 11 counts of conspiracy, bribery, and perjury in connection with allegedly receiving cash payoffs. Since this article, jury deliberations have ended in a deadlock forcing a mistrial.

The trial testimony of Maureen Brown and her father James Brown, is recounted in the article. James Brown, reportedly best man at Flood's 1949 wedding and a former campaign manager or treasurer during most of Flood's 16 terms, testified that he never knew of Flood putting cash into his various campaign and personal accounts. Mr. Brown did concede however, that he had learned that some cash deposits had been made into Flood's 1973 and 1975 campaign accounts by Flood's then administrative assistant, Stephen Elko.

Maureen Brown, James Brown's daughter, reportedly testified that while working in Flood's office, she too never knew of Flood putting cash into his accounts. Ms. Brown however, in addition, testified that she was instructed by Stephen Elko to enter \$1500 in cash into the campaign account books of Representative Flood.

MUR 464 involves similar issues including payments solicited by Elko ostensibly to use the influence of Congressman Flood's office in procuring Federal funding. We therefore recommend merging Pre MUR 27 with MUR 464 which also involves Stephen Elko.

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Washington Star - 1/31/79

Father-Daughter Associates of Flood Deny Knowing He Deposited Cash

By Allan Frank
Washington Star Staff Writer

Law student Maureen Brown and her father, James Lenahan Brown, a longtime law partner of Rep. Daniel J. Flood, testified yesterday that while they worked with Flood they never knew of the Pennsylvania Democrat putting cash in his various campaign and personal accounts.

The father, who was best man at Flood's 1949 wedding, his personal attorney and campaign manager or treasurer during most of the congressman's 16 terms, testified that he never made cash deposits to either the personal or campaign accounts of Flood.

However, James Brown conceded that he had learned that some cash deposits had been made without his authorization into Flood's campaign accounts in 1973 and 1975 by the congressman's then-administrative assistant Stephen B. Elko.

Brown, who after suffering a stroke and other medical problems began relinquishing his authority in Flood's campaigns, office and personal affairs, said he sometimes was absent when financial decisions were made by Elko and others.

AFTER DISCOVERING the 1973 cash deposits, which apparently were disguised by Elko to appear to have come from small contributors, Brown said he told Helen Tomascik, Flood's executive secretary, that as long as he was campaign treasurer he "didn't want anyone else to mess with it (the campaign account)." Brown said he did not learn of the August 1975 cash deposit in the campaign account until he began preparations for the congressman's trial.

Elko, who has been convicted in connection with taking bribes while working for Flood, was one of the chief prosecution witnesses against the congressman, who is charged with 11 counts of conspiracy, bribery and perjury in connection with allegedly receiving more than \$50,000 in payoffs.

The defense has contended that Elko pocketed almost all the money he claims to have solicited for the congressman and that Flood never received any of the payoffs.

Maureen Brown, a third-year law student at Dickinson College, testified that on Aug. 25, 1975, while she was working at her father's request as a secretary in Flood's Wilkes-Barre office, she was told by Elko to enter \$1,500 in cash in the campaign account books.

DURING DIRECT examination by defense attorney Axel Kleiboemer, she said Elko at first told her to list the money as a \$500 contribution from himself and a \$1,000 contribution from Flood. Minutes later, she said, Elko instructed her to blank out that entry and list the entire \$1,500 as having come from Flood.

She said she never gave any deep consideration to Elko's intent because she knew that as the congressman's administrative assistant Elko had tremendous authority. "I didn't think anything of it," she said. "I trusted Mr. Elko."

During a brief cross-examination, Justice Department special attorney David R. Hinden asked Maureen Brown to read the sworn statement attesting to the accuracy of the campaign reporting form for the 1975 period that included the August cash contribution.

After pointing to the line listing Flood as a contributor of \$1,500 and the requirement that the statement be sworn as "true and correct," Hinden asked "whose signature" was on the form.

"Daniel J. Flood," replied Maureen Brown.

In other testimony, a banker and a lawyer who took over from James Brown the responsibility of managing the congressman's financial affairs set Flood's assets at about \$115,000, including more than \$22,000 in U.S. savings bonds, \$40,000 in municipal bonds, \$45,000 in certificates of deposit and stock in an Eastern Pennsylvania banking company, Westinghouse Corp. and in the now-defunct San Juan Race Track.

Flood and his wife also own a modest frame house in Wilkes-Barre, witnesses testified.

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Premier 27

Baker Forms Campaign Fund Panel

By Jack W. Germond
Washington Star Political Editor

Senate Minority Leader Howard Baker announced today that he has formed an "exploratory committee" to help finance his undeclared campaign for the 1980 Republican presidential nomination.

The committee will raise money to pay some of the costs of Baker's preliminary travels to test the wind. But the GOP leader's aides said he still will make no final decision on running until sometime next summer, probably about July 4.

Baker aides said the formation of the committee was dictated by Federal Election Commission regulations that now require such a vehicle to receive campaign contributions and meet costs involved in exploring a presidential candidacy. Several other undeclared candidates have similar operations in place.

Among other things, the explora-

tory committees permit candidates to raise money systematically toward qualifying for the federal matching funds now available to presidential candidates. A candidate must raise at least \$5,000 in each of 20 states in amounts of \$250 or less to qualify.

WHATEVER THE virtues of the committee or the necessity for it, it is apparent that Baker is moving up his timetable for the presidential campaign. Early this winter he was saying he would make no decision on an active candidacy until the Senate had acted on the strategic arms limitation treaty President Carter expects to send up for confirmation sometime early this year.

But now it appears that treaty will be late enough in reaching the Senate — and controversial enough when it gets there — that Baker will be forced into a decision without waiting for

See BAKER, A-10



SEN. HOWARD BAKER
Moves up time schedule

BAKER

Continued From A-1

the vote. One Baker adviser said he would delay his active campaign for SALT only if the Senate decision on ratification appeared imminent at midsummer.

The formation of the committee will permit Baker to raise money for costs, other than those being paid by local party groups, involved in his first intensive political travel early next month. Specifically, an advance man is being dispatched tomorrow to prepare the way for the Lincoln Day appearances Baker will make beginning Feb. 8 in Knoxville, Tenn., Brooklyn, N.Y., Springfield and Galesburg, Ill., Dayton, Ohio, Springfield and Boston, Mass., and Concord, N.H. Later in the month he also plans three days of speaking in Florida.

THE PRESIDENTIAL primaries in New Hampshire, Massachusetts, Florida and Illinois will, of course, be among the earliest in 1980.

Baker and House Minority Leader John Rhodes set up a joint political action committee last year to finance travels they made in behalf of GOP congressional candidates during the 1978 campaign. But James Cannon, Baker's chief political operative, said Baker recognized there would be "serious skepticism" about any continued Baker travel under those auspices, so the new committee was formed.

"It's the only way we can do it," Cannon said.

Baker also has been coming under some predictable pressure from potential supporters to show his colors early — particularly since the whole timetable for the campaign for the presidential nomination seems to have been accelerated. There already are two "serious" candidates who have declared themselves, Rep. Phil Crane and John Connally, and several active if undeclared candidates — including Ronald Reagan, George Bush, Sen. Bob Dole, Sen. Lowell Weicker and Rep. John Anderson — are in the field.

BUT CANNON and other Baker advisers have been reassuring those potential supporters that the Tennessee Republican fully intends to run although he is restrained by his position as minority leader from saying so right now.

Baker's exploratory committee will be headed by James A. Haslam, who served as finance chairman for his reelection campaign committee in Tennessee last year.

(OVER)

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Washington Star - 1/31/79

Father-Daughter Associates of Flood Deny Knowing He Deposited Cash

By Allen Frank
Washington Star Staff Writer

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Flood and his wife also own a modest frame house in Wilkes-Barre, witnesses testified.

30040172719

Pre num 27

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Stephen Elko)
George Young)

MUR 464 (77)

CERTIFICATION

I, Marjorie W. Emmons, Secretary to the Federal Election Commission, do hereby certify that on May 18, 1978, the Commission determined by a vote of 4-0 that pursuant to the memorandum of understanding between the Commission and the Department of Justice, and in light of the amount of time which has transpired from the date of the alleged violation in 1972, that no further action be taken at this time on the above-captioned matter.

Voting for this determination were Commissioners Harris, Springer, Staebler, and Thomson. Commissioners Aikens and Tiernan abstained from voting.

Marjorie W. Emmons

Marjorie W. Emmons
Secretary to the Commission

Date 5/18/78

30010172720

Sent to Emmons
for correction 7-18-78
PJD

BEFORE THE FEDERAL ELECTION COMMISSION
April 28, 1978

In the Matter of)
) MUR 464(77)
Stephen Elko)
George Young)

GENERAL COUNSEL'S REPORT

BACKGROUND

30010172721
This matter was initiated by a news article on November 1, 1977 in the Washington Post which reported that a Justice Department memorandum made public in Los Angeles alleged that Stephen B. Elko, a former aide to Representative Daniel J. Flood (D-Pa.) received \$25,000 in cash "contributions" from a Mr. George Young in exchange for helping to obtain government contracts for a vocational school in Wilkes-Barre, Pennsylvania. The incident was said to have occurred in 1972. These allegations were reportedly denied by a Flood spokesman. A search of Flood's 1972 disclosure reports has apparently turned up nothing about the "contributions."

Subsequent to this, the Commission received a copy of the memorandum which was referred to in the news article. In the memorandum, the Justice Department sets forth its intention to use evidence of the 1972 incident between Elko and Young to support their present case involving a separate bribery charge. A telephone call to the U.S. District Court for the Central District of California reveals that Elko and his co-defendant, Ms. Patricia Brislin, were convicted and sentenced in the California bribery case. This case is now being appealed.

ANALYSIS

The question is whether the reported actions of Mr. Elko and Mr. Young in 1972 constituted violations of the prohibition against political contributions by government contractors and the knowing solicitation of such contributions pursuant to 18 U.S.C. §611 which was in effect at that time. By virtue of the 1974 and 1976 amendments to the Federal Election Campaign Act of 1971, the Commission has primary and exclusive jurisdiction with respect to civil enforcement of §611. The existing law which parallels the old §611 is 2 U.S.C. §411c(a).

Another question is whether Congressman Flood or his campaign committee had a duty to report these contributions pursuant to the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, §304, 86 Stat. 15, 16 (1972) (prior to 1974 and 1976 amendments) which was in effect at that time. The present reporting requirements are set forth in 2 U.S.C. §434.

A major factor to be considered in answering these questions is the scope of the Act's statute of limitations set forth in 2 U.S.C. §455. Section 455 sets a three year statute of limitations after the date of the violation for the Commission to bring suit. According to the Justice Department memorandum mentioned in the Washington Post, the alleged payoff by Young to Elko occurred in 1972-- more than three years ago. It is arguable, however, whether 2 U.S.C. §455 applies to both criminal and civil enforcement of the Act. Words used in §455 such as "prosecuted," "indictment," "information," and "criminal proceeding" seem to indicate that it

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was directed toward criminal proceedings only. If this is the case, then the three year statute of limitations may not apply to civil enforcement proceedings by the Commission against Elko under the old 18 U.S.C. §611 and also possibly against Congressman Flood or his campaign committee under the previously cited reporting requirements then in effect. The question of the statute of limitations as applied in civil enforcement proceedings, however, has not yet been decided.

Also of importance is a "MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENT OF JUSTICE AND THE FEDERAL ELECTION COMMISSION," signed by Benjamin Civiletti, then Assistant Attorney General of the Justice Department's Criminal Division and William Oldaker, the Commission's General Counsel in early December, 1977. It is described as a guide for the enforcement of the Department's and the Commission's statutory duties. Paragraph 4 states that:

4) WHERE INFORMATION COMES TO THE ATTENTION OF THE DEPARTMENT INDICATING A PROBABLE VIOLATION OF TITLE 2, THE DEPARTMENT WILL APPRISE THE COMMISSION OF SUCH INFORMATION AT THE EARLIEST OPPORTUNITY.

WHERE THE DEPARTMENT DETERMINES THAT EVIDENCE OF A PROBABLE VIOLATION OF TITLE 2 AMOUNTS TO A SIGNIFICANT AND SUBSTANTIAL KNOWING AND WILFUL VIOLATION, THE DEPARTMENT WILL CONTINUE ITS INVESTIGATION TO PROSECUTION WHEN APPROPRIATE AND NECESSARY TO ITS PROSECUTORIAL DUTIES AND FUNCTIONS, AND WILL ENDEAVOR TO MAKE AVAILABLE TO THE COMMISSION EVIDENCE DEVELOPED DURING THE COURSE OF ITS INVESTIGATION SUBJECT TO RESTRICTING LAW. WHERE THE ALLEGED VIOLATION WARRANTS THE IMPANELING OF A GRAND JURY, INFORMATION OBTAINED DURING THE COURSE OF THE GRAND JURY PROCEEDINGS WILL NOT BE DISCLOSED TO THE COMMISSION, PURSUANT TO RULE 6 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

WHERE THE DEPARTMENT DETERMINES THAT EVIDENCE OF A PROBABLE VIOLATION OF TITLE 2 DOES NOT AMOUNT TO A SIGNIFICANT AND SUBSTANTIAL KNOWING AND WILFUL VIOLATION (AS DESCRIBED IN PARAGRAPH 2 HEREOF), THE DEPARTMENT WILL REFER THE MATTER TO THE COMMISSION AS PROMPTLY AS POSSIBLE FOR ITS CONSIDERATION OF THE WIDE RANGE OF APPROPRIATE REMEDIES AVAILABLE TO THE COMMISSION.

9 9 7 . 0 . 7 2 3

John Dowd, a Justice Department attorney who is head of a strike force team investigating organized crime has given additional updated information on both Congressman Flood and Elko. In a telephone conversation on Tuesday, April 25, 1978 he informed the Office of General Counsel that Elko and his co-defendant in the California bribery case were both serving time. Elko is presently serving a three year sentence in California and is also an immunized government witness in the investigations of Flood and possibly others. Dowd is conducting the Flood investigations and would not speculate as to when the investigation would end.

Whether Elko's status as an immunized government witness would preclude civil enforcement of our Act is questionable. In light however, of the previously mentioned memorandum between the Justice Department and the Commission, and in the interest of facilitating the government's criminal investigations, the Office of General Counsel recommends that no action be taken by the Commission in this matter.

RECOMMENDATION

Pursuant to the memorandum of understanding between the Commission and the Department of Justice, and in light of the amount of time which has transpired from the date of the alleged violation in 1972, the Office of General Counsel recommends that the matter be closed.

5/17/78
Date

William C. Oldaker
William C. Oldaker
General Counsel

30040172724

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
Stephen Elko)
George Young)

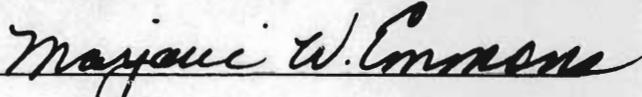
MUR 464 (77)

CERTIFICATION

I, Marjorie W. Emmons, Secretary to the Federal Election Commission, do hereby certify that on May 10, 1978, the Commission determined by a vote of 4-0 to return to the General Counsel the April 28, 1978 report in the above-captioned matter.

Commissioners Aikens and Tiernan were present at the time of the vote, but did not vote in this matter.

Date: 5-11-78


Marjorie W. Emmons
Secretary to the Commission

30040172725

BEFORE THE FEDERAL ELECTION COMMISSION
April 28, 1978

In the Matter of)
)
Stephen Elko) MUR 464(77)
George Young)

GENERAL COUNSEL'S REPORT

BACKGROUND

30010172726

This matter was initiated by a news article on November 1, 1977 in the Washington Post which reported that a Justice Department memorandum made public in Los Angeles alleged that Stephen B. Elko, a former aide to Representative Daniel J. Flood (D-Pa.) received \$25,000 in cash "contributions" from a Mr. George Young in exchange for helping to obtain government contracts for a vocational school in Wilkes-Barre, Pennsylvania. The incident was said to have occurred in 1972. These allegations were reportedly denied by a Flood spokesman. A search of Flood's 1972 disclosure reports has apparently turned up nothing about the "contributions."

Subsequent to this, the Commission received a copy of the memorandum which was referred to in the news article. In the memorandum, the Justice Department sets forth its intention to use evidence of the 1972 incident between Elko and Young to support their present case involving a separate bribery charge. A telephone call to the U.S. District Court for the Central District of California reveals that Elko and his co-defendant, Ms. Patricia Brislin, were convicted and sentenced in the California bribery case. This case is now being appealed.

ANALYSIS

The question is whether the reported actions of Mr. Elko and Mr. Young in 1972 constituted violations of the prohibition against political contributions by government contractors and the knowing solicitation of such contributions pursuant to 18 U.S.C. §611 which was in effect at that time. By virtue of the 1974 and 1976 amendments to the Federal Election Campaign Act of 1971, the Commission has primary and exclusive jurisdiction with respect to civil enforcement of §611. The existing law which parallels the old §611 is 2 U.S.C. §441c(a).

Another question is whether Congressman Flood had a duty to report these contributions pursuant to 18 U.S.C. §304 in effect at that time which parallels the present reporting requirements set forth in 2 U.S.C. §434.

A major factor to be considered in answering these questions is the scope of the Act's statute of limitations set forth in 2 U.S.C. §455. Section 455 sets a three year statute of limitations after the date of the violation for the Commission to bring suit. According to the Justice Department memorandum mentioned in the Washington Post, the alleged payoff by Young to Elko occurred in 1972-- more than three years ago. It is arguable however, whether 2 U.S.C. §455 applies to both criminal and civil enforcement of the Act. Words used in §455 such as "prosecuted," "indictment," "information," and "criminal proceeding" seem to indicate that it was directed toward criminal proceedings only. If this is the case, then the three year statute of limitations would not apply to civil

90040172727

enforcement proceedings by the Commission against Elko under the old 18 U.S.C. §611 and also possibly against Congressman Flood under the old 18 U.S.C. §304 reporting requirements. The question of the statute of limitations as applied in civil enforcement proceedings however, has not yet been decided.

Also of importance is a "MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENT OF JUSTICE AND THE FEDERAL ELECTION COMMISSION," signed by Benjamin Civiletti, then Assistant Attorney General of the Justice Department's Criminal Division and William Oldaker, the Commission's General Counsel in early December, 1977. It is described as a guide for the enforcement of the Department's and the Commission's statutory duties. Paragraph 4 states that:

4) WHERE INFORMATION COMES TO THE ATTENTION OF THE DEPARTMENT INDICATING A PROBABLE VIOLATION OF TITLE 2, THE DEPARTMENT WILL APPRISE THE COMMISSION OF SUCH INFORMATION AT THE EARLIEST OPPORTUNITY.

WHERE THE DEPARTMENT DETERMINES THAT EVIDENCE OF A PROBABLE VIOLATION OF TITLE 2 AMOUNTS TO A SIGNIFICANT AND SUBSTANTIAL KNOWING AND WILFUL VIOLATION, THE DEPARTMENT WILL CONTINUE ITS INVESTIGATION TO PROSECUTION WHEN APPROPRIATE AND NECESSARY TO ITS PROSECUTORIAL DUTIES AND FUNCTIONS, AND WILL ENDEAVOR TO MAKE AVAILABLE TO THE COMMISSION EVIDENCE DEVELOPED DURING THE COURSE OF ITS INVESTIGATION SUBJECT TO RESTRICTING LAW. WHERE THE ALLEGED VIOLATION WARRANTS THE IMPANELING OF A GRAND JURY, INFORMATION OBTAINED DURING THE COURSE OF THE GRAND JURY PROCEEDINGS WILL NOT BE DISCLOSED TO THE COMMISSION, PURSUANT TO RULE 6 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

WHERE THE DEPARTMENT DETERMINES THAT EVIDENCE OF A PROBABLE VIOLATION OF TITLE 2 DOES NOT AMOUNT TO A SIGNIFICANT AND SUBSTANTIAL KNOWING AND WILFUL VIOLATION (AS DESCRIBED IN PARAGRAPH 2 HEREOF), THE DEPARTMENT WILL REFER THE MATTER TO THE COMMISSION AS PROMPTLY AS POSSIBLE FOR ITS CONSIDERATION OF THE WIDE RANGE OF APPROPRIATE REMEDIES AVAILABLE TO THE COMMISSION.

3001017228

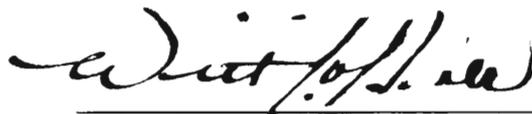
John Dowd, a Justice Department attorney who is head of a strike force team investigating organized crime has given additional updated information on both Congressman Flood and Elko. In a telephone conversation on Tuesday, April 25, 1978 he informed the Office of General Counsel that Elko and his co-defendant in the California bribery case were both serving time. Elko is presently serving a three year sentence in California and is also an immunized government witness in the investigations of Flood and possibly others. Dowd is conducting the Flood investigations and would not speculate as to when the investigation would end.

Whether Elko's status as an immunized government witness would preclude civil enforcement of our Act is questionable. In light however, of the previously mentioned memorandum between the Justice Department and the Commission, and in the interest of facilitating the government's criminal investigations, the Office of General Counsel recommends that no action be taken by the Commission in this matter.

RECOMMENDATION

Pursuant to the memorandum of understanding between the Commission and the Department of Justice, and in light of the amount of time which has transpired from the date of the alleged violation in 1972, the Office of General Counsel recommends that the matter be closed.

4/28 / 78
Date



William C. Oldaker
General Counsel

30040172729

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

)

MUR 464(77)

Stephen Elko

)

)

CERTIFICATION

I, Marjorie W. Emmons, Secretary to the Commission, do hereby certify that on May , 1978, the Commission voted to close the above captioned matter.

Marjorie W. Emmons
Secretary to the Commission

80040172730

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
Stephen Elko)
George Young)

MUR 464

CERTIFICATION

I, Marjorie W. Emmons, Secretary to the Federal Election Commission, do hereby certify that on February 23, 1978, at an Executive Session of the Federal Election Commission at which a quorum was present, the Commission determined by a vote of 6-0 to approve the recommendation of the General Counsel to defer taking any formal action in the above-captioned matter until copies of the indictment and Memorandum have been reviewed.

Marjorie W. Emmons

Marjorie W. Emmons
Secretary to the Commission

DATED: February 24, 1978

30040172731



FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

February 15, 1978

MEMORANDUM TO: CHARLES STEELE
FROM: MARJORIE W. EMMONS *MWE*
SUBJECT: MUR 464 (77) - 1st General Counsel's Report
dated February 13, 1978

The above-mentioned document was circulated to the
Commissioners on February 14, 1978 at 10:00.

Commissioner Tiernan has submitted an objection to
MUR 464 (77) thereby placing it on the Executive Session
Agenda for February 23, 1978.

30040172732



February 13, 1978

MEMORANDUM TO: Marge Emmons
FROM: Elissa T. Garr
SUBJECT: MUR 464

Please have the attached 7 day report on MUR 464 distributed to the Commission on a 24 hour no-objection basis.

Thank you.

30040172733

FEDERAL ELECTION COMMISSION
1325 K Street N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

DATE AND TIME OF TRANSMITTAL
BY OGC TO THE COMMISSION FEB 13 1978

MUR NO. 464
DATE COMPLAINT RECEIVED
BY OGC _____

ATTORNEY R. Johnson

COMPLAINANT'S NAME:

RESPONDENT'S NAME: Stephen Elko and George Young

RELEVANT STATUTE: 18 U.S.C. §611; 18 U.S.C. §304(b)(2)

INTERNAL REPORTS CHECKED: 1972 disclosure reports of
Flood for Congress Committee

FEDERAL AGENCIES CHECKED: Department of Justice

SUMMARY OF ALLEGATIONS

A news article from the November 1, 1977,
Washington Post reports that a Justice Department memoran-
dum made public in Los Angeles alleges that in exchange for
aid in obtaining government contracts for a vocational
school in Wilkes-Barre, Pennsylvania, Mr. George Young
gave \$25,000 in cash "campaign contributions" to
Mr. Stephen Elko, a former aide to Rep. Daniel J. Flood;
and to Ms. Patricia Breslin (See Attachment I). The news-
paper article reports that the allegations were denied by a
spokesman for Flood after review of Flood's campaign records.

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The reported actions of Mr. Young, Mr. Elko and Ms. Breslin may violate the prohibition against political contributions by government contractors and the knowing solicitation of such contributions as provided in 18 U.S.C. §611, which was in effect at that time. The 1974 Amendments to the Federal Election Campaign Act of 1971 gave the Commission primary jurisdiction with respect to civil enforcement of §611; the 1976 Amendments gave the Commission exclusive jurisdiction for civil enforcement of the successor statute, 2 U.S.C. §441c. Neither the Amendments nor the legislative history supporting them gives any indication that Congress intended for the Commission's civil enforcement authority to be limited to violations occurring after January 1, 1975.

Our review of 1972 disclosure reports filed by the Flood Committee found no contributions listed as coming from Mr. Young. If, as the newspaper article reports, the \$25,000 was a campaign contribution and it was actually received by the Flood Committee, there would be a violation of the reporting requirements of 18 U.S.C. §304(b)(2), which was then in effect.

We requested a copy of the indictment and Memorandum from the Department of Justice; they inadvertently sent us the wrong materials. We have spoken with the U.S. Attorney in Los Angeles handling the prosecution of Elko and Breslin, and we expect to receive the materials shortly.

At this time we believe that there are insufficient facts to recommend that the Commission take any action.

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RECOMMENDATION

Defer taking any formal action until copies of the indictment and Memorandum have been reviewed.

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ATTACHMENT I

→
WASHINGTON

Post

Nov. 1, 1977

Hill Aide Reported Paid \$25,000 by Businessman

A former administrative assistant to Rep. Daniel J. Flood (D-Pa.) received \$25,000 in cash from a New Jersey businessman in exchange for helping obtain government contracts for a vocational school in Wilkes-Barre, Pa., in 1972, according to a Justice Department memorandum made public in Los Angeles. The allegations were filed at the start of an unrelated bribery trial in which the former Flood aide, Stephen Elko, and an associate, Patricia Brislin, were convicted two weeks ago in U.S. District Court in Los Angeles.

According to the Justice memo, New Jersey businessman George Young, developer of a computerized training device for vocational schools, said he gave \$25,000 in cash "campaign contributions" to Elko in the Bahamas and watched the congressional aide and Brislin "secreted the cash in money belts in order to bring it back to the U.S."

The cash was given in exchange for help in securing vocational school financing from the departments of Labor and Health, Education and Welfare, the memo alleged. Flood is chairman of the House Appropriations subcommittee for those departments.

A spokesman for Flood said yesterday that the Pennsylvania congressman "does not even know George Young," and said a search of the campaign records turned up no indication of such a contribution.

Elko, who left Flood's staff in June, 1976, and Brislin were convicted two weeks ago in federal court in Los Angeles on charges of soliciting and receiving approximately \$25,000 in bribes in exchange for using the influence of Flood's office to obtain accreditation for federally funded trade schools on the West Coast. They have not been sentenced.

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MUR 464 #205

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

United States Department of Justice

UNITED STATES ATTORNEY

CENTRAL DISTRICT OF CALIFORNIA
U. S. COURT HOUSE
312 No. SPRING STREET
LOS ANGELES, CALIFORNIA 90012

800355

ASO:RLB:DRH:bjs
FTS 798-3036

February 6, 1978

Mr. William C. Oldaker
General Counsel
Federal Election Commission
1325 K Street N.W.
Washington, D.C. 20463

Re: CR-77-739ALS

Dear Mr. Oldaker:

Pursuant to your request of February 2, 1978,
I am enclosing a copy of a pre-trial memorandum filed
in the above matter captioned Government's Trial Memorandum
on Admissibility of Evidence Pertaining to Similar
Acts.

If I can be of any further assistance to you,
please do not hesitate to call me.

Very truly yours,

ANDREA SHERIDAN ORDIN
United States Attorney



DAVID R. HINDEN
Assistant United States Attorney
Assistant Chief, Criminal Division

Enclosure

30040172738



ASO:RLB:DRH:bjs
FTS 798-3036

February 6, 1978

Mr. William C. Oldaker
General Counsel
Federal Election Commission
1325 K Street N.W.
Washington, D.C. 20463

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Very truly yours,

ANDREA SHERIDAN ORDIN
United States Attorney

DAVID R. HINDEN
Assistant United States Attorney
Assistant Chief, Criminal Division

Enclosure

30040172739

1 ROBERT L. BROSIO
United States Attorney
2 ERIC A. NOBLES
Assistant United States Attorney
3 Chief, Criminal Division
DAVID R. HINDEN
4 Assistant United States Attorney
1241 United States Courthouse
5 312 North Spring Street
Los Angeles, California 90012
6 Telephone: (213) 688-3152

SEP 2 12 08 PM '77
CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.

7 Attorneys for Plaintiff
United States of America

8 UNITED STATES DISTRICT COURT
9 FOR THE CENTRAL DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,) NO. CR 77-739-ALS
11)
Plaintiff,) GOVERNMENT'S TRIAL MEMORANDUM
12)
v.) ON ADMISSIBILITY OF EVIDENCE
13)
STEPHEN ELKO, et al.,) PERTAINING TO SIMILAR ACTS
14)
Defendants.)
15)
16)

17 I

18 STATEMENT OF FACTS

19 The Government intends to offer evidence of similar acts by the
20 defendants Elko and Brislin wherein Elko used his position as the
21 Administrative Assistant to the Chairman of the Labor, Health and
22 Welfare Appropriations Subcommittee to exact payments from individuals
23 sponsoring educational projects dependent upon federal funding. The
24 Government is filing its memorandum at this time because of its
25 intention to refer to such evidence during its opening statement.
26 This evidence, which is summarized below, is admissible to establish
27 the specific intent of the defendants in committing the crimes
28 charged in the indictment and to show the existence of a common plan
or scheme.

DHR:bl

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1 After the Hurricane Agnes disaster in 1972, an individual
2 named George Young was attempting to establish a vocational school
3 in Wilkes-Barre, Pennsylvania and secure financing from the Labor
4 and Health, Education and Welfare Departments. After Young encountered
5 difficulties with the agencies, Elko told him that a \$25,000 cash
6 contribution to Congressman Flood would make Young's problems with
7 Labor and Health, Education and Welfare vanish. Young gave Elko
8 the money in cash in the Bahamas and observed Elko and Brislin
9 secrete the cash in money belts in order to bring it back to the
10 United States.

11 In 1974, Elko introduced Young to a federally financed training
12 program for teachers. Young was to receive several hundred thousand
13 dollars as a subcontractor for a pilot project under this program.
14 In exchange for using his position to facilitate the disbursement
15 of these federal funds, Elko demanded \$2.00 for every teacher who
16 passed through the program. Elko also made arrangements with Young
17 for the laundering of these funds so that payments to him could be
18 disguised.

19 II

20 EVIDENCE OF THESE SIMILAR ACTS IS ADMISSIBLE TO
21 ESTABLISH THE DEFENDANTS' SPECIFIC INTENT IN
22 COMMITTING THE CRIMES ALLEGED IN THE INDICTMENT
23 AND TO SHOW THAT THOSE CRIMES WERE PART OF A
24 PLAN AND SCHEME.

25 Evidence of these payments and solicitations is admissible
26 as evidence of defendants' specific intent to commit the crime of

27 /
28 /

1 bribery alleged as an object of the conspiracy in count one^{1/}
2 and as the "unlawful activity" in counts two and three^{2/} of the
3 indictment.

4 Rule 404(b), Federal Rules of Evidence provides that:

5 "Evidence of other crimes, wrongs, or acts
6 is not admissible to prove the character
7 of a person in order to show that he acted
8 in conformity therewith. It may, however,
9 be admissible for other purposes, such as
10 proof of motive, opportunity, intent, pre-
11 paration, plan, knowledge, identity, or
12 absence of mistake or accident." [Emphasis supplied.]

13 An unbroken line of cases in this Circuit and five other
14 circuits has held it proper to admit evidence of bribes not
15 alleged in the indictment in order to establish specific intent
16 in accepting the bribe which was the subject of the indictment,
17 or to show the existence of a common plan or scheme. Eg., United
18 States v. Castro, 476 F.2d 750, 753-54 (9th Cir. 1973); Schneider
19 v. United States, 192 F.2d 498, 501-02 (9th Cir. 1951); United
20

21 1/ The conspiracy count incorporates the intent required to
22 prove the substantive offense. Danielson v. United States,
23 321 F.2d 441, 445 (9th Cir. 1963).

24 2/ The substantive offense, 18 U.S.C. §1952, requires a specific
25 intent, United States v. Gibson Specialty Co., 507 F.2d 446,
26 449 (9th Cir. 1974), and incorporates the substantive offense
27 of bribery which also requires proof of specific intent, United
28 States v. Anderson, 509 F.2d 312, 329 (D.C. Cir. 1974).

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1 States v. Baggett, 481 F.2d 114, 115 (4th Cir.), cert. denied,
2 414 U.S. 1116 (1973); United States v. Murphy, 480 F.2d 256, 260
3 (1st Cir.), cert. denied, 414 U.S. 912 (1973); United States v.
4 Laurelli, 293 F.2d 830, 832 (3rd Cir. 1961); United States v.
5 Baneth, 155 F.2d 978, 980 (2d Cir. 1946); and Ybor v. United States,
6 31 F.2d 42, 44 (5th Cir. 1929).

7 In United States v. Castro, supra, the defendant, an immigra-
8 tion official, was charged with accepting a bribe for preparing
9 false immigration documents. He denied accepting any bribes and
10 claimed that the office in which he worked operated in such a
11 slipslop manner that actions which appeared to be incriminating
12 (eg., filling out forms for aliens at his home) were customary
13 practices in his office. At trial evidence was admitted of a
14 prior bribery scheme with another accomplice. In holding that
15 the evidence was admissible, the court emphasized that the evidence
16 bore on the issues of "intent, guilty knowledge, plan, scheme and
17 modus operandi." Id., at 755. The Castro decision has been cited
18 with approval subsequent to the enactment of the new Federal Rules
19 of Evidence. Eg., United States v. Rocha, 553 F.2d 615, 616 (9th
20 Cir. 1977).

21 In United States v. Baggett, supra, 481 F.2d, the defendant,
22 an official with authority over zoning proceedings, was convicted
23 of violating the Travel Act (18 U.S.C. §1952), the underlying
24 offense being bribery. The court held that it was proper to admit
25 evidence that the bribee had received gifts on other occasions
26 from individuals (other than the alleged bribor) who had received
27 favorable zoning rulings in order to prove a continuing course of
28 conduct. Id., at 115.

1 In United States v. Laurelli, supra, 293 F.2d., the defendant
2 was convicted of offering a bribe to a government inspector. The
3 court held that it was proper to admit evidence of a subsequent
4 bribe offer by the defendant to a different government inspector
5 who was connected with work on the same project. The evidence was
6 deemed admissible as tending to show defendant's intent and a
7 pattern of conduct. Id., at 832. As the Laurelli case illustrates,
8 the relevancy of such a bribe is not affected by the fact that may
9 have occurred subsequent to the bribe alleged in the indictment.
10 See Benchwick v. United States, 297 F.2d 330, 336 (9th Cir. 1961);
11 and Waller v. United States, 177 F.2d 175-76 (9th Cir. 1949).

12 The evidence of these similar acts is admissible on the
13 additional ground that it reveals the existence of a common plan
14 or scheme. The scheme involved Elko's use of his strategic
15 position to exact payments from individuals who had problems
16 with agencies subject to the jurisdiction of Congressman Flood's
17 Appropriations Subcommittee. Elko's modus operandi was to demand
18 money in exchange for the Congressman's "assistance" and he was
19 assisted in these transactions by Brislin.

20 The Ninth Circuit has repeatedly held that where evidence of
21 other offenses reveals "a common scheme, plan, system or design"
22 such evidence is admissible. United States v. Brashier, 548 F.2d
23 1315, 1326 (9th Cir. 1976), United States v. Oliphant, 525 F.2d
24 505, 507 (9th Cir. 1975), cert. denied, 424 U.S. 1473, United
25 States v. Castro, 476 F.2d 750, 753 (9th Cir. 1973), cert. denied,
26 410 U.S. 916, United States v. Webb, 466 F.2d 1352, 1358 (9th Cir.
27 1972).

28 /

30040172745

1 In United States v. Brashier, 548 F.2d 1315, 1325-26 (9th Cir.
2 1976), the court set out three criteria for determining the
3 admissibility of similar acts to show a defendant's criminal
4 intent or the existence of a common plan or scheme: a) that the act
5 should be similar and close enough in time to be relevant; b)
6 evidence of the act should be clear and convincing; and c) the
7 probative value of the evidence outweighs any potential prejudice.

8 The evidence of the defendants' similar acts in this case
9 clearly meets all of these criteria. Both sets of transactions
10 occurred while Elko was Flood's Administrative Assistant. The
11 offenses alleged in the indictment and the similar acts both
12 involve Elko's use of his position as Administrative Assistant to
13 Congressman Flood to exact payments from individuals dependent
14 upon federal funding. Both projects in which George Young was
15 involved were educational projects requiring financing from
16 Departments of Labor, or Health, Education and Welfare. Brislin
17 assisted Elko on one occasion handling the cash payment from
18 Young and she acted as an aider and abettor in one of the West
19 Coast Schools transactions. Finally, the proof of the transactions
20 with Young will be clear, convincing and simple, ie., the testimony
21 of Young himself.

22 On the issue of whether the probative value of similar acts
23 outweighs possible prejudice to the defendant, the Ninth Circuit
24 has consistently ruled in favor of admissibility. United States
25 v. Rocha, 553 F.2d 615, 616 (9th Cir. 1977), United States v.
26 Burns, 529 F.2d 114, 118 (9th Cir. 1975), United States v. Marshall,
27 526 F.2d 1349, 1360 (9th Cir. 1975), United States v. Moore, 522
28 F.2d 1068, 1079 (9th Cir. 1975), United States v. Perez, 491 F.2d

1 167, 172 (9th Cir. 1974), cert. denied, 419 U.S. 855, United States
2 v. Castro, supra, at 753 (9th Cir. 1973).

3 The striking similarities between the Young transactions and
4 those alleged in the indictment demonstrate the great probative
5 value of this evidence. At the same time, this evidence is suffi-
6 ciently distinct from evidence of the offenses alleged in the
7 indictment to avoid confusion of the issues and prejudice to the
8 defendants.

9 The general requirement embodied in Rule 403 of the Federal
10 Rules of Evidence (ie, that the prejudice does not substantially
11 outweigh the probative value of the evidence) does not alter the
12 conclusion of admissibility required by the above-cited decisions.
13 The new rule on similar acts merely codifies prior case law
14 in this Circuit, United States v. Rocha, supra, 553 F.2d at 616.

15 CONCLUSION

16 Based upon the foregoing points and authorities, it is
17 respectfully submitted that the Government should be permitted to
18 offer the above-described evidence in its case-in-chief to show
19 specific intent and to establish the existence of a common plan
20 or scheme.

21 Respectfully submitted,

22 ROBERT L. BROSIO
23 United States Attorney

24 ERIC A. NOBLES
25 Assistant United States Attorney
26 Chief, Criminal Division

27 *David R. Hinden*

28 DAVID R. HINDEN
Assistant United States Attorney

Attorney for Plaintiff
United States of America

CERTIFICATE OF SERVICE BY MAIL

I, Dottie McCoy, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of the United States Attorney, United States Court House, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by mail described in this Certificate was made;

that on September 2, 1977, I desoposited in the United States Mails, in the United States Court House, 312 North Spring Street, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of Government's Trial Memorandum on Admissibility of Evidence Pertaining to Similar Acts

addressed to Valerie A. Cavanaugh &
Alan M. May, Esqs.
1800 N. Highland Ave., Suite 615
Hollywood, CA 90028

at their last known address, at which place there is a delivery service by United States Mail.

This Certificate is executed on September 2, 1977, at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

Dottie McCoy

Dottie McCoy

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DEPARTMENT OF JUSTICE

CENTRAL DISTRICT OF CALIFORNIA

RETURN IN FIVE DAYS TO

OFFICE OF

UNITED STATES ATTORNEY

LOS ANGELES, CALIF. 90012

OFFICIAL BUSINESS

PENALTY FOR PRIVATE USE, \$300

78 FEB 9 AM 11:32

FEDERAL ELECTION COMMISSION

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Mr. William C. Oldaker
General Counsel
Federal Election Commission
1325 K Street N.W.
Washington, D. C. 20463

KALLEN, GRANT, MAY & TREMBLATT
LAW CORPORATION

1800 NO. HIGHLAND AVE., SUITE 615
HOLLYWOOD, CALIFORNIA 90028
TELEPHONE: (213) 461-3281

ALAN M. MAY, ESQ.
VALERIE A. CAVANAUGH, ESQ.

*To E Gore
for MUR
file*

ATTORNEYS FOR DEFENDANTS

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA)
Plaintiff)
vs.)
STEPHEN ELKO, PATRICIA BRISLIN)
Defendants)

NO. CR 77-739 ALS

MOTION FOR JUDGMENT OF
ACQUITTAL, OR IN THE
ALTERNATIVE FOR A NEW
TRIAL

2:00 P.M., November 7, 1977

COMES NOW THE DEFENDANTS, and each of them, and respectfully
move that the Court enter a Judgment of Acquittal as to each
defendant as to each of the Counts in the Indictment in the above
entitled matter, or in the alternative for a new trial. The
motion is based upon the pleadings, records and transcripts in
these proceedings, and upon the following grounds:

1. As to both Defendants, a variance between the evidence
offered at trial and that alleged in the indictment exists,
relative to count I such that both Defendants deserve acquittal
as to count I.

2. As to both Defendants, the evidence presented at trial
cannot induce in the mind of a reasonable man a belief as to

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1 guilt beyond a reasonable doubt.

2 3. As to Defendant Breslin, specifically as to counts I, III,
3 IV, and VI of the indictment, there was insufficient evidence at
4 trial to support the guilty verdict thereon.

5 4. As to Defendant Elko, specifically as to counts I, II,
6 III, IV, and VI, of the indictment, there was insufficient
7 evidence at trial to support the guilty verdict thereon.

8 5. A new trial herein would, in fact, be in the interest of
9 justice in that the verdict was

10 (a) Not supported by sufficient evidence; nor

11 (b) consistent with the weight of the evidence.

12 6. A new trial herein would in fact be in the interest of
13 justice in that the court ought to have sustained Defendants' ob-
14 jections to the Government's proposed instructions and to the
15 manner in which the jury was charged.

16 7. A new trial herein would in fact be in the interest of
17 justice in that the court erred in refusing to permit the intro-
18 duction of evidence bearing on the credibility of the Government's
19 key witnesses.

20 I

21 STATUS OF THE CASE

22 On October 19, 1977, the defendants were found guilty as to each
23 of the counts charged as follows: Both as to Count One (Con-
24 spiracy to Defraud the Government and accept Bribes) ELKO as to
25 Count Two (inducing FRED PETERS to travel in interstate commerce
26 for bribery); ELKO and BRISLIN as to Count Three also referring to
27 inducing PETERS to travel for bribery); Count Four, obstructing
28 Justice, and a Count each (5 and 6) for perjury.

1 At the close of the government's case, and at the close of the
2 defendants' case, the defendants moved for a Judgment of Acquittal.
3 The Court denied the motions at the conclusion of the government's
4 case, giving the defendants leave to renew said motions at the
5 conclusion of the defendants' case, and thereafter reserved judgment
6 when the motions were renewed.

7
8 II

9 SUMMARY OF THE CASE

10 The government contends in Count One of the indictment, in
11 essence, that defendants ELKO and BRISLIN conspired with unindicted
12 co-conspirators FLEMING and PETERS to use ELKO's position as the
13 administrative assistant to Chairman Daniel Flood (D-Pa.) of the
14 U.S. House of Representatives Appropriations Subcommittee for the
15 Departments of Labor and Health, Education and Welfare, to corruptly
16 influence the Office of Education into extending the eligibility
17 for federal guaranteed loan programs, and obtaining eventual accre-
18 didation for, the West Coast Trade Schools which had been bought by
19 Automation Institute of Los Angeles, California. In exchange for
20 his efforts, ELKO was to receive for himself certain bribes, and
21 one bribe for the benefit of In-Tech Corporation headed by the
22 defendant BRISLIN.

23 In Count Two of the indictment, the government, in substance,
24 alleges that defendant ELKO induced PETERS to travel on or about
25 June 15, 1972 to Washington, D.C., in interstate commerce, for the
26 purpose of giving to ELKO a \$4,000.00 bribe that the government
27 alleges took place on June 16, 1972. In Count Three of the Indict-
28 ment, the government, in substance, alleges that defendant ELKO,

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1 with defendant BRISLIN aiding and abetting, induced PETERS to
2 travel in interstate commerce, on or about June 28, 1972, for the
3 purposes of bribing ELKO on behalf of In-Tech Corporation with a
4 check for \$15,000.00 delivered allegedly to ELKO on June 29, 1977.

5 Both Counts Two and Three are overt acts of Count One of the
6 Indictment. An alleged bribe of \$5,000.00 to ELKO in late April
7 or early May, 1972, was an overt act of Count One presented by the
8 government at the time of trial, but was not charged as either an
9 overt act on Count One or a substantive count in the Indictment.

10 In Count Four, defendants ELKO and BRISLIN are charged with
11 conspiring together with PETERS and FLEMING during the period Aug-
12 ust, 1975, to May, 1977, to obstruct justice by misleading govern-
13 ment investigators, and lying to the grand jury, about the events
14 set forth in Counts One thru Three of the Indictment.

15 In Count Five of the indictment, defendant ELKO, in substance,
16 is charged with lying to the grand jury under oath in April of 1976,
17 when he denied taking the bribes alleged in Count Two of the indict-
18 ment, and the bribe of late April or early May that was not set
19 forth in the Indictment.

20 In Count Six of the Indictment defendant BRISLIN is charged
21 with lying to the grand jury under oath in April of 1976, by
22 stating that she received the \$15,000.00 In-Tech check from PETERS
23 (as opposed to ELKO receiving it), and that she returned to PETERS
24 the sum of \$13,500.00 of that money.

25 Count Seven of the Indictment, which had alleged that defend-
26 ants induced FLEMING to perjure himself before the grand jury, was
27 dismissed before trial at the request of the government; presumably
28 because the government was aware that the evidence would show that

1 FLEMING neither needed, nor received, any inducement to fib -- it's
2 second nature to him.

3 Counts Five and Six (and Seven before its dismissal) are
4 overt acts in Count Four, along with the additional overt acts
5 alleging that the defendants rehearsed their grand jury testimony
6 with witnesses MR. & MRS. FLEMING in April, 1976; discussing the
7 case with the unindicted co-conspirators, during the period of the
8 alleged conspiracy; and allegedly telling PETERS in a telephone
9 call of October, 1975, that he would "be taken care of" if he did
10 not incriminate anyone. The government also contended that the defendant
11 had FLEMING play tape recordings of a portion of his Senate interview
12 (of January, 1976), and his FBI and IRS interviews (of May and July,
13 1976), during a visit to their home in February, 1976, to
14 coordinate their stories prior to their April, 1976, grand jury
15 testimony.

16
17 III

18 SUMMARY OF THE EVIDENCE

19 COUNTS ONE, TWO AND THREE:

20 1. Background -- Government witnesses PETERS and FLEMING,
21 both of who received immunity from prosecution for their testimony,
22 testified that they first met in December, 1971, after PETERS became
23 President of Automation Institute in November, 1971. (TR p. 529)
24 PETERS had been with Automation Institute for about a year, having
25 started as a placement director after falsifying his resumé, (TR
26 pp. 643-647). Prior thereto he was known by his true name, FRED
27 BRANIFF, but had changed his name (TR p. 601) and fled to Los
28 Angeles, faking his own death, from Texas, after being accused by

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1 his estranged wife of incest with his daughter. (TR pp. 644-645,
2 649-650). PETERS had quit a job with a Chicago firm after being
3 accused of "improprieties", and had fraudulently enlisted in the
4 Armed Forces (TR p. 648).

5 Automation Institute had recently acquired the West Coast
6 Trade Schools which had been determined as eligible for federally
7 insured student loans by the Office of Education, but were required
8 to obtain accreditation by NATTS before September 1, 1972, or
9 their eligibility would lapse. (TR pp. 526-528, Exhibit F) How-
10 ever, Automation Institute was accredited and had no eligibility
11 problems (Exhibit F).

12 FLEMING was at that time a lobbyist for the Kellogg Corpor-
13 ation under an employment contract (TR pp. 800-801) which only
14 provided a minority of his income needs because of his marital
15 situation -- he was divorced from wife #1 with two children and
16 was married to Carolyn, wife #2 -- and derived the majority of
17 his income from undisclosed other sources (TR pp. 946-947). He
18 also had a "heavy" drinking problem at the time. (TR pp. 811-812).

19 2. First Mention of Money -- After applying for accreditation
20 to NATTS for the West Coast Trade Schools, FLEMING and PETERS
21 visited with Mr. GODDARD of NATTS in January, 1972, and determined
22 that there might be a problem with the accreditation, and that help
23 from ELKO, whom they had both known socially, might be sought
24 because of his position with Congressman Flood. (TR pp. 816-817).

25 The testimony as to when the subject of money in connection
26 with accreditation efforts, first arose, however, as supplied by
27 government witnesses, is a mass of contradictions.

28 PETERS in his FBI interview of May 12, 1977, (See Exhibit T

1 as a summary of Agent VOGEL's testimony, TR pp. 1320-1323) stated
2 that the day of the GODDARD meeting in January, FLEMING stated
3 that PETERS would have to spread some money around to get anything
4 done at all. Later that evening they met with ELKO in a room at
5 the Congressional Hotel along with a "southern gentleman" and
6 attorney Mark GREEN, and ELKO stated he would need "five suits of
7 long underwear" which FLEMING explained to mean \$5,000.00, and
8 ELKO would in turn give the same to Congressman FLOOD.

9 PETERS in his testimony (TR pp. 534, 546-548, 624), recanted
10 and stated that at the first meeting with ELKO there was no mention
11 of money, and then changed his testimony again and stated that they
12 discussed "expenses." (TR pp. 625-626). PETERS also went on to
13 testify that the mention of "long underwear" took place on April 26,
14 1972, in a phone conversation, as opposed to a meeting (TR pp. 565-
15 567). FLEMING, in direct refutation, testified that it was PETERS
16 who stated that he would spread some money around (TR pp. 900-901,
17 924 11.2-5), that there was no discussion of money (TR p. 819),
18 that he never heard ELKO directly solicit any money from PETERS
19 (TR p. 913, 11. 14-22,); that ELKO had not used the term "long
20 underwear" in his conversations with PETERS that FLEMING knew of,
21 (TR p. 1030, 11. 4-7); and on p. 3, pp. 2 of his FBI Interview of
22 May 25, 1977, (See exhibit U as a summary of Agent VOGEL's test-
23 imony, TR pp. 1323-1329) that by May 12, 1972 (when ELKO wrote his
24 first letter on the subject matter to the Office of Education)
25 "ELKO had not mentioned 'long and short underwear.'"

26 3. First Payment of Money -- Both PETERS and FLEMING agree
27 that the first payment of money went to FLEMING in the form of a
28 \$10,000.00 check drawn on Automation Institute (see Exhibit 6)

1 which was described as a house loan. (TR pp. 551-553, 821, 1043).
2 FLEMING testified he cashed that check and put the cash, or part
3 of it, in the rafters of his house in Virginia where it remained
4 "for several months". (TR p. 1043, 11. 11-24). However, FLEMING's
5 son GEOFFREY FLEMING testified that when he removed the cash in
6 the rafters three months later that the spring, his father told
7 him that that was the money he had been given by JOE GAMBINO, son
8 of reputed Mafia Chieftain Carlos Gambino, for obtaining the former
9 an ICC trucking permit that had been previously denied, (TR pp.
10 1302-1304). Government Exhibit 77, the FLEMING immunity- from-
11 any-criminal-prosecution-for-any-crime agreement, shows that the
12 ICC matter is one that he is providing information about to the
13 government.

14 4. First Mention of Bribery -- PETERS testified he first
15 mentioned bribery to a third party in late April, 1972, to Mr.
16 TOKESHI who was at that time Chairman of the Board, and with his
17 family the major stockholder, of Automation Institute. PETERS
18 told TOKESHI that money (\$25,000.00) was needed for ELKO and FLOOD
19 to get the West Coast Trade Schools accredited, (TR pp. 416, 567-
20 568). PETERS testified that these conversations took place in
21 TOKESHI's office in a building across the street from his own
22 office.

23 TOKESHI, who was also given immunity from prosecution for his
24 testimony, confirmed that PETERS had represented the bribe price
25 to him, though he said the conversations took place in PETER's
26 office across the street in a building from his office. (TR pp.
27 410-413) TOKESHI also stated he never heard of any requests for
28 money from anyone other than PETERS (TR p. 419).

1 5. First Alleged Bribe to ELKO -- PETERS testified that on
2 or about May 7, 1972, he arrived that day at National Airport and
3 was picked up by ELKO and FLEMING (TR p. 569). He had previously
4 had the heretobefore cited conversation with ELKO by phone about
5 "five suits of long underwear" on April 26, 1972, (TR pp. 567-
6 568), a conversation government witness FLEMING denies took place,
7 as heretobefore cited. PETERS testified in substance that he sat
8 in the front seat next to ELKO, who was driving, and FLEMING sat
9 in the back seat. PETERS handed an envelope containing \$5,000.00
10 in \$100.00 dollar bills that he had obtained from TOKESHI to FLEMING
11 and then FLEMING handed the envelope to ELKO (TR pp. 569-570).

12 There was no conversation. (TR p. 571, 11. 1-5). ELKO
13 simply put the envelope in his pocket. (TR p. 570).

14 Government witness TOKESHI denied ever having so given
15 PETERS the \$5,000.00, (TR p. 455, 11. 6-14). FLEMING testified that
16 during the day (TR p. 950, 11. 16-19). ELKO and he picked up
17 PETERS at the airport, testified as to the same seating arrange-
18 ment as had PETERS, but testified that there was not only conver-
19 sation, but more. He testified that after PETERS had given him
20 the envelope, ELKO, in spite of FLEMING's protestations, insisted
21 on knowing whether the envelope was for him and having it given to
22 him. Further, after receiving the envelope, FLEMING continues,
23 ELKO opens it, sees the cash, then slips it into his pocket, not-
24 withstanding the fact that he is driving., (TR pp. 829-832) FLEMING
25 is unsure whether this incident takes place in late April, 1972, or
26 May 7, 1972 (TR pp. 907, 970-971). On direct examination, though,
27 he indicates the May date (TR p. 833, 11. 3-13). PETERS is specific
28 that it occurred on May 7, 1972 (TR pp. 569-570, 627-631). FLEMING

1 cannot recall what happened before the incident, the purpose of the
2 trip, what time the bribe took place other than in the day, where
3 they went after the incident, or any further conversations. (TR
4 pp. 950-952).

5 Government Exhibits 8 and 9, and defendants Exhibit G show the
6 only late April trip of PETERS to Washington, D.C., after April
7 16, 1972, is on April 24, 1972, and the first trip in May, 1972,
8 was when he flew in from Memphis, Tennessee from a WHAM-T Corp.
9 Board meeting PETERS left Memphis at 6:05 P.M. and arrived in
10 Washington, D.C. at 9:00 P.M. that night.

11 TOM JONES, a defense witness, testified that on April 24,
12 1972, he and ELKO, and the rest of FLOOD's staff, were in Northeast
13 Pennsylvania campaigning for the re-election of Congressman FLOOD
14 who was in a tough primary campaign that year. Election day was
15 Tuesday, April 25, 1972. (TR pp. 1262-1263, Exhibit R). JONES
16 further testified that on May 5, 1972, he drove ELKO up to Wilkes-
17 Barre, Pennsylvania, and did not drive ELKO back to Washington, D.C.
18 until Monday, May 8, 1972, (TR pp. 1265-1271). Exhibits E evidence
19 the return trip, (TR p. 1266). BRISLIN testified that that was
20 the first weekend she was home after several months out of the
21 country, and ELKO was with her there in Pennsylvania on May 6 and 7
22 1972, and did not leave to return to Washington until JONES picked
23 him up on Monday morning May 8, 1972. (TR pp. 1471-1472). JOHN
24 WILLINGHAM, confirming JONES' testimony, testified that when ELKO
25 and JONES met him at the Rotunda restaurant on the evening of
26 Monday, May 8, 1972, they discussed their lateness as being caused
27 by their late return that day from Pennsylvania to Washington, D.C.
28 (TR p. 1290). WILLINGHAM also testified that he met ELKO and

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1 JONES only that one time, and only saw them again at the time of
2 trial. (TR pp. 1289-1290).

3 6. Second Alleged Bribe to ELKO -- Both PETERS and FLEMING
4 testified that on June 16, 1972, PETERS gave FLEMING another check
5 drawn on Automation Institute (see Exhibit 14) made payable to
6 FLEMING and dated June 16, 1972, in the amount of \$10,000.00.

7 FLEMING then endorsed the check, went to a bank in Washington, D.C.,
8 and cashed the check. (TR pp. 579-582, 845-847, 908-909). After
9 that, PETERS and FLEMING'S stories begin to sharply diverge and

10 contradict each other. According to PETERS, after FLEMING cashed
11 the check, PETERS put the money, which was in \$100.00 bills into an
12 envelope, and FLEMING put it in his pocket (TR p. 582). According

13 to FLEMING, he gave the money to PETERS (TR p. 847) saying its your
14 money you count it. According to PETERS they cashed the check at
15 RIGGS NATIONAL BANK (TR p. 582), according to FLEMING at AMERICAN

16 SECURITY AND TRUST (TR p. 846). Later that day they go together
17 to the Congressional Hotel, to meet with ELKO--FLEMING putting the
18 time at around 4:00 to 4:30 P.M.--and the meeting took around 45

19 minutes (TR p. 983). According to PETERS they went to a private
20 room and there was a Southern gentleman present, but ELKO was not.
21 ELKO then subsequently showed up, and the Southern gentleman left

22 the room. Prior to ELKO's arrival, FLEMING handed PETERS the
23 envelope containing the \$10,000.00 and PETERS then handed \$2,000.00
24 to FLEMING who needed to make payroll. PETERS then handed to

25 FLEMING \$4,000.00 to give to ELKO, and retained \$4,000.00 for him-
26 self. When ELKO finally arrived, he made some phone calls, and
27 then FLEMING handed to ELKO the \$4,000.00. Thereafter, they dis-

28 cussed the fact that In-Tech needed \$15,000.00, and BRISLIN entered

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1 the room thereafter, and joined in the discussion.

2 In another version altogether, PETERS had told the FBI in
3 his interview of May 12, 1977 (See p. 3, Exhibit T summarizing
4 VOGEL's Testimony TR pp. 1320-1323) that the April 16, 1972, "house
5 loan" to FLEMING was to be repaid by FLEMING giving a portion of
6 the proceeds to ELKO, and no mention of a second check on June 16,
7 1972, is made. PETERS, in that statement, recounts FLEMING cashing
8 the first "house loan" check, and then at a later date coming to
9 the Congressional Hotel and producing an envelope. FLEMING then
10 divides the cash with ELKO, and there is no mention of any cash
11 being given to PETERS.

12 In stark and material contrast to both of PETER's versions,
13 however, FLEMING testified that when they went to ELKO's suite
14 in the Congressional Hotel, no one else was present. A discussion
15 then ensued about a \$4,000.00 loan needed to In-Tech. FLEMING
16 felt that PETERS was going to get some money out of his pocket,
17 so he left the room and went to the bathroom. FLEMING saw no
18 money passed that day, other than \$1,000.00 he received from PETERS
19 for expenses such as bar tabs he had picked up. (TR pp. 847-850,
20 909). Thereafter there was further discussion about a napkin
21 receipt (which PETERS never mentions) for the \$4,000.00, (TR pp.
22 850-851) .FLEMING doesn't recall if BRISLIN ever entered the room,
23 and the only conversation he recalls her having with PETERS about
24 In-Tech that day took place downstairs in the Democratic Club
25 (TR pp. 851-852).

26 Defense witnesses, meanwhile, placed ELKO nearly 2,500 miles
27 away in San Francisco, California, preceding the AMA convention,
28 on June 16, 1972, and the two days thereafter. William COLLEY, then

1 director of Congressional Relations for the AMA, testified, in
2 substance, that he flew out of Dulles Airport (Washington, D.C.)
3 that day with Congressman FLOOD, and other staff members of the AMA
4 and FLOOD's office, and ELKO was not with them, but was ahead there
5 in San Francisco that evening at the Hotel after they arrived, (TR
6 pp. 1129-1134). Congressman FLOOD testified that when he arrived
7 at the San Francisco Hilton on June 16, 1972, with William COLLEY
8 and the rest of the party, ELKO was there to greet him in the lobby
9 and to show him to the suite that ELKO had arranged for him earlier
10 that day, and had explained to the Congressman at that time that
11 he had taken the twin room pre-registered to the Congressman and
12 arranged for the suite for the Congressman instead, (TR pp. 1145-
13 1148). Both COLLEY and FLOOD identified themselves and ELKO in
14 the photograph Exhibit A taken at a dinner in San Francisco on
15 June 17, 1972. FLOOD further testified that ELKO's duties entailed
16 him preceding the Congressman at the AMA Convention to check on
17 arrangements (TR pp. 1145-1146).

18 The current manager of the San Francisco Hilton, MERLING,
19 who at the time was the sales manager in charge of the AMA con-
20 vention for the hotel, testified that the documents he produced,
21 Exhibits B and D, showed that a twin was pre-registered to Congress-
22 man FLOOD, and that at 11:06 A.M. on June 16, 1972, the twin was
23 reassigned to STEPHEN ELKO, and a suite assigned to Congressman
24 FLOOD, and both billed to the Congressman. Further, MERLING test-
25 ified, that their procedure would have required the person so
26 changing the arrangements to properly identify himself both as to
27 his true identity and his staff capacity to speak for the Congress-
28 man, arranging another suite for him, and then having both billed

1 to the Congressman's office. While it was stipulated that the
2 registration form was not completed by ELKO, MERLING testified that
3 the clerk, or officer, who completed the form for the official who
4 identified himself and his capacity (authority) would have entered
5 that official's name, and the person's name so entered was that of
6 STEPHEN ELKO -- at 11:06 A.M., June 16, 1972, (TR pp. 1226-1236).
7 While MERLING testified it was possible for some AMA official to
8 make the pre-registration, he also testified that had that been the
9 case that official's name would have been indicated on the card, and
10 there was no such indication, (TR pp. 1246-1247, 1250, 1252 11.
11 21-25.) It is also significant, that while the more popular and
12 usual spelling of the name Steven is with a "v" rather than a "ph",
13 ELKO's first name has the rarer usage of STEPHEN. Exhibit B shows
14 that the spelling of the first name is "Stephen".

15 7. The third alleged bribe, the In-Tech Check -- To begin
16 with, FLEMING denied having any knowledge what happened with re-
17 spect to the \$15,000.00 check made payable by Automation Institute
18 for In-Tech Corporation dated June 28, 1972 (TR p. 882, 11. 2-9).
19 There is no question that on June 28, 1972, the mentioned check was
20 drawn in Los Angeles by PETERS made payable to In-Tech in the
21 amount of \$15,000.00, (See Exhibit 19), and was brought to
22 Washington, D.C. by PETERS. It is also admitted by BRISLIN that
23 she deposited that check to In-Tech's account on June 30, 1972, and
24 on the same date cashed a check on In-Tech's account for \$13,500.
25 Significantly, the check is drawn on the same Automation Institute
26 account from which FLEMING received his two (2) \$10,000 checks
27 (Exhibits 6, 14, and 19), but unlike the former two (2) checks
28 (Exhibits 6 and 14), the In-Tech check shows two (2) signatures --

1 that of PETERS and TOKESHI -- instead of just PETERS'. The account-
2 ing records of Automation Institute also classified that check as a
3 "Consulting fee," (Exhibit I), as opposed to the "loan" as later
4 characterized by PETERS.

5 In his FBI interview of May 12, 1977, (see Exhibit T, p. 7, a
6 summary of VOGEL's testimony at TR pp. 1320-1323), PETERS stated
7 that he gave the check to ELKO at the Congressional Hotel. In his
8 testimony PETERS states that he gave it to ELKO in the basement of
9 the Cannon House Office Building, (TR p. 587, 11. 1-4). PETERS
10 can't remember whether it was morning or afternoon, daytime or
11 nighttime, or whether ELKO was coming or going, (TR 656, 11. 17-25.)
12 BRISLIN testified that she received the In-Tech check, not ELKO,
13 from PETERS on June 29, 1972, (TR pgs. 1421 and 1422), at the
14 Congressional Hotel.

15 PETERS stated that the first discussion with ELKO, and then
16 BRISLIN, occurred on June 16, 1972, after the alleged \$4,000.00
17 transaction. But even according to PETERS, that after BRISLIN join-
18 ed the meeting, they talked about In-Tech, and she showed him some
19 books and materials, and talked about \$15,000.00, though he didn't
20 listen to the explanation, (TR pg. 585, 11. 5-14). Further, PETERS
21 testified, PETERS' motive for the payment was to help ELKO and
22 BRISLIN out since they were people who could get things done for
23 him. PETERS did not testify that he communicated that to the
24 defendants, (TR. p. 586, 11. 5-15). PETERS refutes the government's
25 contention that he was induced to bring the In-Tech check by anyone,
26 stating basically it was his idea (TR. p. 586). He did not testify
27 that either of the defendants had either asked, suggested or expect-
28 ed him to bring that check. FLEMING recalls BRISLIN and PETERS

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1 having conversations during the period of February to May of 1972
2 about the sale of In-Tech to Peters, but he more cogently recalls
3 her having a discussion with PETERS about selling him some books,
4 materials and scripts (TR. pp. 926-927). BRISLIN denied having dis-
5 cussions about selling In-Tech to or obtaining a loan from PETERS,
6 and in fact at that time was in a merger with another corporation
7 (TR pp. 1419, 1557). However, BRISLIN concurs with both PETERS
8 and FLEMING that she showed PETERS some books and materials, and
9 discussed with him the purchase of the course In-Tech had develop-
10 ed for use in PETERS' vocational schools (TR. pp. 1427-1429). The
11 agreed purchase price was to be \$15,000, with the materials de-
12 livered first to the Washington area where In-Tech's new offices
13 were moving, and where PETERS could review them upon purchase,
14 (TR. pp. 1430). BRISLIN gave to PETERS the introductory course
15 constituting about 10% of the materials and books ordered (TR pg.
16 1429). After the Agnes disaster destroyed the offices of In-Tech,
17 and BRISLIN's house, she journeyed to Washington from Pennsylvania
18 around the 29th of June, 1972 (TR pp. 1431-1433). It was then
19 PETERS gave her the check for the full purchase price, she suggest-
20 ed he write a new check and agreed at a figure due In-Tech of
21 \$1,500 for the materials PETERS had received, and then he request-
22 ed, and she agreed, to deposit the check and give PETERS the
23 balance in cash, (TR. pp. 1433-1434). On the 30th of June she
24 deposited that same check and cashed a corporation check for
25 \$13,500 which she maintained in her possession until returning
26 that cash to PETERS in Washington, D.C., on or about July 2, 1972,
27 (TR. pp. 1439, 1433-1444). PETERS denies she gave him any money
28 back (TR pg. 587), but BRISLIN was able to recall seeing a girl

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1 with PETERS when he picked up the money (TR. pp. 1444, 11. 22-23),
2 and it developed at the trial that in fact a Sue Brennan, a girl
3 friend of PETERS had flown back to Washington, D. C., on June 30,
4 1972, and spent the weekend there with him (TR. pp. 667-668).

5 8. BRISLIN'S Knowledge of Events Set Forth in Counts One
6 Through Three of the Indictment -- PETERS testified that BRISLIN
7 was not present during the conversations he alleged took place
8 regarding money for ELKO and/or FLOOD (TR. p. 651, 11. 17-21, p.
9 710, 11. 19-23), nor was BRISLIN present during any of the payments
10 alleged both as overt acts in Count One, and as substantive Counts
11 in Count Two and Three, nor during any of the alleged solicitations
12 for the same (TR. p. 651, 11. 17-25, p. 652, 11. 2-14, p. 668, 11.
13 14-25, p. 669, 11. 1-5, p. 710, 11. 19-25, p. 711, 11. 2-6, p. 712,
14 11. 1-11), nor did PETERS ever overhear or discuss with her any-
15 thing that would lead him to believe she knew anything about ELKO's
16 accreditation efforts (TR. 668, 11. 17-25, p. 669, 11. 1-5).
17 FLEMING, likewise, gives no evidence that BRISLIN was either pre-
18 sent or knew about the discussions regarding money or accreditation,
19 and when queried on the subject denies BRISLIN'S involvement (TR.
20 p. 952, 953.)

21 9. What the Government Failed to Show at All -- The government
22 failed to show for what, if anything, or where , these alleged
23 monies went, though all of the defendants' and In-Tech's financial
24 records have been in the government's possession since 1972. The
25 government also failed to specifically show that any of the money
26 went to aide In-Tech, yet the testimony of PETERS (TR. p. 584), and
27 the government's theory, was that In-Tech's financial troubles were
28 the motive for the alleged bribed. While in contrast, the defendants'

1 witness DIXON testified that whenever In-Tech required monies, he
2 would, and did -- in excess of \$100,000.00 -- advance the funds
3 (TR. pp. 1315-1318).

4 10. Testimony Regarding ELKO'S Efforts with OE -- The govern-
5 ment's contention that ELKO caused the letters of May 12, August
6 1, 1972 and August 18, 1972, to be written and sent to OE, and in
7 so doing signed the Congressman's name, and used "flowery" and
8 strong language was never disputed, and was testified to by PETERS,
9 FLEMING, FLOOD, FULLER and CROWLEY at needless length, and they
10 speak for themselves (See Exhibits 10,16, 23, 29, 31, 32, 33).

11 However, significant in the testimony is that while the government's
12 theory was that by signing the Congressman's name, and using strong
13 and flowery language, the same suggested by some circumstantial
14 evidence of a deep abiding interest on the part of ELKO, from which
15 a bribe and intent to interfere with the decision making process
16 of OE could be drawn, the government's witnesses FULLER and CROWLEY
17 testified in contradiction to that theory. FULLER admitted and
18 agreed that it was more usual than unusual for Congressional (and
19 indeed Executive Branch) aides to draft and sign their bosses name
20 to letters (TR. p. 504, 11. 8-20), and indeed FULLER and Lee
21 PIERSON (and a signature pen) did the same for Commissioner Marland
22 (TR. pp. 502-503). Further, FULLER testified that of the fifty or
23 more calls that he received from ELKO during the period of the
24 alleged conspiracy, in only twelve or fifteen was the West Coast
25 Trade School eligibility and accreditation problem even discussed
26 for part of the conversation (TR. pp. 507-508). FULLER also test-
27 ified that while the language of the letters was unusual for a
28 Congressman, having seen other letters and speeches of FLOOD, the

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1 language of the letters was in keeping with FLOOD'S use of flowery
2 language, in fact routine. (TR. pp. 506-507.)

3 While CROWLEY tries hard to sustain the government's theory,
4 she admitted in testimony that the extension of eligibility for the
5 schools that had been directly rated as eligible for OE loan
6 guarantees by OE prior to the formation of NATTS, and which had
7 not yet been considered for accreditation by NATTS, had been offered
8 to all 117 of such schools in addition to the West Coast Schools.
9 Such was a result of the Commissioner's acts, which he had the auth-
10 ority to take notwithstanding the delegation of parts of his auth-
11 ority by him to subordinate employees and agencies. (TR. pp. 780-
12 783, 785-787). CROWLEY testified that while she believed that Mr.
13 PROFFIT had taken such action because they were embarrassed by the
14 Commissioner's action, she in fact did not know whether PROFFIT
15 had been ordered by, or had consulted with, the Commissioner with
16 respect to that decision. (TR. p. 798, ll. 1-9). The Government
17 failed to call PROFFIT as a witness.

18 FULLER, testified that once NATTS had made a decision, FULLER
19 contacted ELKO who stated that having achieved the objective of
20 obtaining consideration by NATTS of applications before fund cut-
21 offs, FLOOD's office was no longer interested. (TR. pp. 499-501,
22 See Exhibit F). While PETERS and FLEMING testified that ELKO had
23 demanded another \$25,000.00, which was refused after a visit to OE
24 by PETERS following notification that the West Coast Trade Schools
25 wouldn't be accredited, CROWLEY testified that PETERS visit to OE
26 occurred after FLOOD'S office withdrew interest, (TR. pp. 790-792)
27 and that thereafter West Coast Trade Schools, and all other trade
28 schools similarly situated, continued to have extensions of their

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1 eligibility while they appealed NATTS decisions. (TR. pp. 789-792).

2 11. PETERS, FLEMING, MUNTAIN and HOUSING, the Real Happ ing
3 of 1972 -- Both FLEMING and PETERS testified that after NATTS failed
4 to timely file the inspection report in April, 1972, they became
5 discouraged as to whether the West Coast Trade Schools would ever
6 be accredited, especially in light of their meeting with GODDARD
7 just the month before (TR. pp. 825-826, 562-564). On or about
8 April of 1972, about the same time PETERS gave FLEMING the
9 \$10,000.00 "house loan," PETERS, FLEMING and RED MUNTAIN of the U.S.
10 Department of Housing and Urban Development got together, and MUNTAIN
11 began to have his apartment paid for by Automation Institute. (TR.
12 pp. 630-631, 707) On April 24, 1972, at Hogate's restaurant,
13 WILLINGHAM, who was on leave from WHAM-T Corp., a structural building
14 company, to HUD, was approached by PETERS and FLEMING, in the
15 company of MUNTAIN, as to the possibility of PETERS financing WHAM,
16 and taking over operations of that company, in the amount of \$250,000.
17 (TR. pp. 1280-1281) FLEMING was to get a finders fee (TR. p. 936
18 11. 2-6). The initial good faith advance on May 6, 1972, to WHAM
19 was to be \$25,000.00. (TR. p. 1282). It was after that meeting
20 that PETERS told TOKESHI that he needed the money, supposedly to
21 bribe ELKO and FLOOD. (TR. pp. 567-568) On May 6, 1972, PETERS
22 met with the WHAM board, presented his proposal, and gave WHAM
23 \$25,000.00, the money having been diverted from Automation Institute
24 by PETERS for that purpose. (TR. p. 1292, Exhibits G, N, O) There-
25 after PETERS advanced almost \$135,000.00 of Automation Institute
26 funds to WHAM and took over as President, while another Automation
27 Institute official FISCHER became Vice-President, and the stock
28 was all put in PETERS own name. (Exhibits N and O)

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1 PETERS continued with WHAM until about October of 1972 when
2 the Board of Directors of WHAM began to question PETERS about
3 \$66,489.00 he had received supposedly for expenses which were not
4 documented. (TR. p. 685, 11. 7-22)

5 Shortly after the meeting between FLEMING, MONTAIN, PETERS
6 and WILLINGHAM in April of 1972, a conversation came up with regard
7 to Sterling Home expiration and PETERS and FLEMING became interest
8 in that corporation likewise. (TR. p.934) The parties stipulated
9 that the Agnes disaster in FLOOD, which according to Congressman
10 FLOOD'S testimony (TR. p.) was the worst disaster in America'
11 history or so he was told, occurred on June 22, 1972. According to
12 FLEMING'S testimony, that heightened their interest in Sterming
13 Home ex and obtaining government contracts through Congressman
14 FLOOD for the sale of Sterling Home X's inventory to the FLOOD
15 victims in the disaster area (TR. pp. 934-935). On June 28, 1972,
16 FLEMING became aware that an emergency appropriation bill for
17 \$200,000,000.00 for the relief of disaster victims of Hurricane
18 Agnes had been introduced in the House of Representatives on June
19 28, 1972. Not only had that bill been introduced on that day, but
20 had also been referred to the Appropriations Committee and then
21 immediately reported back to the House, indicating that it would
22 assuredly pass after remaining on the Speaker's desk for the man-
23 datory two days. (TR. pp. 990-991). On or about that date, June
24 28, 1972, Fred PETERS took a plane bound for Washington, D. C.
25 (See Exhibit J and H). According to the expense voucher of Fred
26 PETERS (See Exhibit G) that night he had a dinner with Daryl FLEMING
27 Red MONTAIN and Jerry JONES at the Rotunda restaurant. TOKESHI
28 testified that he also met with them on or about that period of time

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1 in Washington, D.C. having flown there himself on June 27, 1972
2 (TR. pp. 431, 437-438). According to the Affidavit of John P. Mc
3 ^{AI}Green (See Exhibit P) PETERS made several calls that night pur-
4 chasing a total of over \$58,000.00 worth of stock in his name and
5 into TOKESHI'S name in Sterling Home X Corporation. FLEMING, of
6 course, was aware that the \$200,000,000.00 appropriation bill would
7 become law the very next day (TR. p. 991, 11. 15-20). According
8 to PETERS, at least \$54,000.00 of the purchase price was paid for
9 by check of Automation Institute (TR. p. 687, 11. 13-18) and of
10 course, the Institute was never reimbursed for any of those funds.
11 Thereafter, Fred PETERS flew up to Wilksbere ²⁻¹⁰⁻⁷² Pennsylvania (TR. p.
12 691) to discuss with FLOOD the possibility of selling modular
13 housing of Sterling Home X to the disaster victims in Pennsylvania
14 Apparently, FLOOD and ELKO did not assist PETERS in that endeavor
15 (TR. p. 692, 11. 1-10). Thereafter, according to McGreen's Affi-
16 davit, (See Exhibit P) PETERS called MC GREEN and told him to watch
17 the ticket ^Ktape the next Monday that the big news would be coming
18 out. Mc GREEN in fact watched the ticket ^Ktape that following Monday
19 only to find out that on July 11, 1972, Sterling Home X was filing
20 for bankruptcy.

21 Between WHAM, Inc. and Sterling Home X Corporation, PETERS
22 diverted a total of nearly \$250,000.00 in funds from West Coast
23 Trade Schools into housing enterprises. According to the testimony
24 of PETERS, FLEMING and FLEMING'S son GEOFFREY, they all expected
25 that these enterprises would bring high financial rewards. PETERS
26 himself testified that during that same period of time, that in
27 excess of \$100,000.00 of Automation Institute funds were diverted
28 for his personal benefit (TR. p. 704).

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1 COUNTS 4, and 6.

2 12. FLEMING and PETERS' business associations by and
3 through 1975 --- In May 1973, when the West Coast Trade School
4 shut down. Fred PETERS left Los Angeles and went to Lake Havasu,
5 Arizona, taking with him approximately \$150,000.00 or more,
6 (TR. pp. 740-741). FLEMING and PETERS by the Fall of 1975 were
7 involved in a multitude of businesses together, ranging from
8 selling group auto insurance to union officials they met through
9 Red MOUNTAIN, the sale and rental of automobiles, to oil filter
10 distribution, the selling of urethane wheels for forklifts, to
11 distribution and production of skateboards, (TR. pp. 997-1012).

12 Since 1974, according to FLEMING's testimony, he had
13 ceased being an employee of KELLOGG, and became a consultant un-
14 til relieved of his duties in February of 1976, though he con-
15 tinued to receive payments under his contract until December of
16 1976 (TR. pp.). On or about the Fall of 1975, Fred
17 PETERS and his wife were living with Darvl FLEMING in his apart-
18 ment and the girl who became FLEMING's wife, (TR. pp.).

19 13. Arrest of PETERS in August 1970 --- On August 15,
20 1975, according to FLEMING, PETERS called on the date of his
21 arrest and told them that he had been arrested for a passport
22 violation and that the bond was \$200,000.00. PETERS continued
23 that federal prosecutors had offered him immunity from prosecu-
24 tion if he would implicate government officials in bribes.
25 FLEMING recounted that PETERS rejected such an offer and wanted
26 FLEMING to convey a message to his friends in the East that he
27 could "do five years standing on his head", (TR. pp. 994-996).
28 PETERS, at the pretrial hearing on July 25, 1977, testified that

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1 as soon as he was arrested, he volunteered to a U.S. Marshal
2 that he had information regarding a Congressman in Washington
3 to whom he had paid money and that, thereafter, he was engaged
4 with the U.S. Attorney's Office in conversations regarding
5 immunity, (TR. pp. 3-6). At the time of PETERS' arrest, FLEMING
6 already knew of the Senate's interest in investigating the West
7 Coast Trade Schools, having learned of that fact on or around
8 July of 1975, (TR. pp. 864). PETERS and FLEMING continued to
9 discuss the question of immunity in the days following PETERS'
10 arrest in August of 1975, with PETERS conveying to FLEMING the
11 fact that federal investigators were more interested about infor-
12 mation about allegations of bribery to public officials than
13 anything else, (TR. p. 996). Shortly thereafter, FLEMING married
14 Louise FLEMING, his current wife. Mrs. FLEMING testified that
15 she and Daryl got married shortly after PETERS' arrest and that
16 on the night of her marriage, she spent her honeymoon traveling
17 with FLEMING and PETERS to Battle Creek, Michigan to sell fork-
18 lift wheels to the Kellogg Corp, (TR. pp. 1113-1114; also see
19 TR. pp. 1014-1015).

20 14. ELKO'S call to PETERS in October of 1975 --- In Octo-
21 ber of 1975, according to FLEMING's testimony, ELKO called and
22 asked to speak to PETERS and significantly stated that it con-
23 cerned a check that BRISLIN had cashed for PETERS in the amount
24 of \$15,000.00 (TR. pp. 1016, 11. 7-20).

25 PETERS also testified that likewise, they mentioned to
26 him that they recall having cashed the check for PETERS, though
27 he stated that was their version of the story, and then he went
28 on to inform them that he had decided to take the Fifth Amendment

1 when testifying before the Senate Committee. There is no indi-
2 cation for either PETERS or FLEMING that either BRISLIN or ELKO
3 requested or commented on PETERS' explanation that he had planned
4 to invoke the Fifth Amendment privilege, (TR. p. 600). PETERS
5 also went on to assure them, according to his testimony, that he
6 would destroy his copy of the In-Tech check. PETERS also testi-
7 fied, (TR. p. 607) that ELKO told him a story about Bobby Baker
8 to the effect that when Bobby Baker got his hand caught in the
9 cookie jar, he took his medicine, went to jail, and when he came
10 out was a rich man. However, when asked if there was any dis-
11 cussion about the applicability about Bobby Baker's story to the
12 instant case, PETERS, in essence, denied that there was any discus-
13 sion but simply suggested that he understood it as a suggestion
14 that he keep his mouth shut. There was never any evidence
15 offered by the Government that ELKO or BRISLIN ever counseled, re-
16 commended or suggested to either FLEMING or PETERS that they
17 either refuse to testify or perjure themselves when so testifying
18 before any investigator or investigative body or proceeding. In
19 fact, when asked that specifically in testimony, FLEMING denied
20 that ELKO or BRISLIN had ever so requested, (TR. p. 1021).

21 15. Playing of tapes in February of 1976 --- FLEMING
22 testified that he and his wife, LOUISE, came to stay with BRISLIN
23 and ELKO during the first week of February 1976 in Washington,
24 D.C. According to FLEMING, he had just closed down his house
25 there and were moving his furnishings to the West Coast. He
26 testified that during that period of time he played for BRISLIN
27 and ELKO tapes he had made over the previous year with the F.B.I.
28 and Senate Investigators. He also testified that a few days after

1 playing those tapes, they were then duplicated by ELKO's attor-
2 neys, (TR. pp. 873-875). FLEMING went on to testify, (T.R.
3 p. 1037), that in 1976 he was also interviewed by the Internal
4 Revenue Service, which was taped in addition to that of the
5 F.B.I. and Senate Investigators. He also played that for the
6 FLEMINGS in February of 1976. However, he admitted that those
7 interviews that he allegedly played for ELKO and BRISLIN in
8 February of 1976 did not actually take place until June or July
9 of 1976, (TR. p. 1037). On re-direct examination, FLEMING thought
10 he may actually have played them for ELKO and BRISLIN after
11 their April 1976 grand jury testimony in June of 1976, (TR. p.
12 1040, 11. 7-10). Still unexplained is how the I.R.S. interview
13 of July 1976 could have been played in June of 1976.

14 16. Hyatt House meeting prior to April 1976 grand jury
15 testimony of ELKO and BRISLIN --- FLEMING testified that shortly
16 before ELKO and BRISLIN were scheduled to testify before the
17 grand jury in Los Angeles in April of 1976, ELKO called him and
18 said he was coming to Los Angeles with BRISLIN for that purpose,
19 (TR. pp. 877-878). FLEMING then went on to testify that the
20 night before the grand jury testimony that he and his wife,
21 LOUISE, along with ELKO and BRISLIN, stayed at the Hyatt House
22 Hotel in a room together and discussed the facts that would
23 probably be inquired into by the grand jury. FLEMING then re-
24 counts (TR. pp. 880-881) a discussion between ELKO and BRISLIN
25 where they discuss with varying recollections the facts pertain-
26 ing to the In-Tech check transaction. In an effort to elicit
27 from Mr. FLEMING the Government's theory that the varying recol-
28 lection of facts between ELKO and BRISLIN with regard to that

1 transaction was their attempt to put together a false story and
2 that they were therefore discussing alternative versions of what
3 to testify to, and opposed to simply trying to determine the
4 true facts of an event that had occurred four years previous,
5 Mr. HINDIN asked FLEMING: "At this point were you basically
6 discussing different versions of what happened?" (TR. p. 881,
7 11. 18-19) significant was FLEMING's answer: "I'm not sure that
8 I can answer that question, 'different versions'. It only
9 happened one way. I do not know which way it was." (TR. 881,
10 11. 20-22) on TR. p. 882 HINDIN and FLEMING adequately establish
11 that FLEMING had no knowledge of what actually transpired during
12 the In-Tech transaction and presumably, therefore, was really
13 not in any position to testify as to whether ELKO and BRISLIN
14 were concocting a story or simply refreshing their recollections
15 as to the true facts.

16 16. Proceedings of 1977 --- In February of 1977, PETERS
17 was tried and convicted on a multitude of federal charges arising
18 out of his stewardship and activities at Tutomation Institute.
19 He was thereafter sentenced in March of 1972 to five years in the
20 Federal Correctional Institute, (TR. pp. 611-612).

21 On April 25, 1972, shortly after Fred PETERS was sentenced
22 to five years in jail, Daryl FLEMING decided to seek immunity
23 from prosecution from the United States Government and enter into
24 an agreement where he has immunity from prosecution for any crime
25 he may have ever committed, (See Exhibit 72) (TR. pp. 1119-1122)
26 (specifically p. 1122, 11. 15-22) in exchange for cooperating
27 with the Government by providing them with allegations and infor-
28 mation concerning public officials and agencies. On May 11, 1977,

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1 PETERS was interviewed by Dan VOGEL of the F.B.I. (see Exhibit
2 T) wherein he provided information relative to this case, he
3 also plead guilty to the pending tax evasion counts and on the
4 same day in a deal with the Government received a two years con-
5 current sentence with his five year sentence -- in fact, there-
6 fore, no additional time. He also received on that same day
7 immunity from prosecution for any offenses arising out of mat-
8 ters about which he would testify, (TR. pp. [redacted]). Neither
9 FLEMING nor PETERS were interviewed again by either the F.B.I.
10 or the Government prosecutors until after the grand jury met
11 and indicted the defendants on June 8, 1977. VOGEL of the F.B.I.
12 appeared before the grand jury using his recollection of the
13 interviews in the form of Form 302's as the basis of his testi-
14 mony, (TR. pp. 1344-1345). The Government stipulated that nei-
15 ther FLEMING or PETERS appeared before the grand jury which
16 indicted these defendants.

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IV.

ARGUMENT

1. AS TO BOTH DEFENDANTS, A VARIANCE BETWEEN THE EVIDENCE OFFERED AT TRIAL AND THAT ALLEGED IN THE INDICTMENT EXISTS, RELATIVE TO COUNT I SUCH THAT BOTH DEFENDANTS DESERVE ACQUITTAL AS TO COUNT ONE.

As stated in Clark and Boardmen, Federal Rules of Criminal Procedure, Federal Practice, p. 289 (1975), in the practice comments to Rule 29, FRCP, the Motion for Acquittal.

" . . . can also object to variance if the evidence offered by the Government at trial substantially varies with that alleged in the indictment, even if the proof at trial makes out a crime. The directed acquittal in such cases is based upon the defendant's constitutional right to be indicted by a grand jury before the case is passed upon by a petit jury, and to receive adequate notice of the charges."

The Government adduced extensive evidence at trial concerning detailed alleged transactions and an overt act covering the time period April 25 - May 7, 1972. The Indictment was unusually specific as to dates, places and times of the other two overt acts constituting the conspiracy count of the indictment, as the Court noted in its Order refusing the Defense its request for a Bill of Particulars.

The Indictment alleged two overt acts with reasonable specificity. The defense timely filed a Request for bill of Particulars in order to obtain a clear idea of the case the Government would be producing. Cognizant of the difficulties of presenting a defense in such a case: i.e. Defendants reside and work in

1 Washington, D.C. and defense counsel in Los Angeles and the acts
2 complained of took place almost five years ago, the Government
3 opposed the Request for a bill of Particulars regarding the overt
4 acts of the conspiracy.

5 The Court, in its Order, p. 4, lines 9-28, denied Defendants
6 request on the grounds that the Indictment was "clearly suffi-
7 cient" to give Defendants protection against double jeopardy and
8 to afford the defendants an opportunity to prepare a defense. The
9 Court continued, p. 5, lines 1-18, to detail the specificity of
10 overt acts alleged and to conclude that such was sufficient.

11 Under the Federal Rules of Criminal Procedure, Rule 7 (e) an
12 indictment may not be amended except for extremely minor allega-
13 tions such as corrections of typographical errors. Subsection (f)
14 of Rule 7 was amended in 1966 to encourage more liberal granting
15 of motions for bills of Particulars in order to avoid this very
16 type of prejudicial surprise. (Roviaro v. United States, 353 U.S.
17 53 (1957).

18 Defendants timely filed a Motion in Limine to exclude the
19 evidence of this variance. The Motion was denied. That denial,
20 allowing the Government to go forward with the evidence at trial,
21 was error. The Government adduced almost one-half of its alleged
22 conspiracy overt act evidence at trial on this transaction. See
23 Statement of Facts, p. 9-10, supra. The Defense, on one day's notice
24 presented an alibi defense, (Statement of Facts, p. 10, supra.)

25 Defendant is entitled, by dint of the Sixth Amendment to be
26 "informed of the nature and cause of the accusation" and must be
27 provided with sufficient information for the preparation of the
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1 defense. Russell v. United States, 369 U.S. 749 (1962). Addi-
2 tionally, the Fifth Amendment protection against double jeopardy
3 mandates a precise statement of the crime with which defendant is
4 charged.

5 The variant evidence offered by the Government at trial
6 should not have been available as a possible overt act and, fur-
7 ther, should have been excluded on the grounds that, due to unfair
8 surprise and substantial prejudice its probative value was clearly
9 outweighed. Federal Rules of Evidence, Rule 403; U.S. v Mahler,
10 452 F.2d 547 (C.A. Cal. 1971) cert. den. 92 S. Ct. 1517, 405
11 U.S. 1069, 31 L. Ed.2d 801 (1971).

12 Russell, supra, indicates that even a Bill of Particulars
13 would not cure the defects in the Indictment, in the instant
14 case, at p. 1049, c.f. Government of Virgin Islands v. Aquino,
15 378 F.2d 540 (1967).

16 Therefore, Defendants are entitled to a granting of the
17 motion on either of the alternate grounds.
18 We would also point out to the Court, as it developed at trial
19 the evidence of this unalleged overt act was far from clear and
20 convincing, but contradictory and confusing. The two prosecution
21 witnesses to this even could not agree on what day it occurred,
22 what happened in the car as to conversation and the manner in
23 which the money was handled, the physical evidence showed that
24 PETERS didn't even fly in to Washington, D.C. until the evening
25 of the day alleged by the attorney for the government, and the
26 origin of the funds as testified by PETERS was refuted by the very
27 government witness from whom PETERS testified he obtained the same.

28 On the other hand, the defendant was, according to his

1 evidence, was probably not even in Washington, D.C., on either
2 of the dates testified to, and developed in what time he had
3 after being surprised by that allegation some evidence as to
4 his alibi. However, in that manner, the defendants were extreme-
5 ly prejudiced by the introduction of that contradictory and
6 confusing evidence of the government which, by the axiom "where
7 there is smoke there is fire," colored the case in favor of the
8 government without proving it, and left the defendant little time
9 to prove in a more convincing manner his alibi defense.

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1 2. AS TO BOTH DEFENDANTS, THE EVIDENCE PRE-
2 SENTED AT TRIAL CANNOT INDUCE IN THE MIND OF A
3 REASONABLE MAN A BELIEF AS TO GUILD BEYOND A
4 REASONABLE DOUBT.

4 In considering a Judgment for Acquittal a Judge is permitted
5 to set aside a jury verdict for insufficiency of the evidence.
6 United States v. Tramunti, 500 F.2d 1334(1974), cert. den. 95 S.
7 Ct. 667.

8 The testimony of the government witnesses in a prosecution
9 for violation of Federal Narcotics Tax laws, disclosed no sub-
10 stantial contradictions such as the types as would require grant-
11 ing of a motion for directed verdict. United States v. Morell,
12 423 F.2d 1212 (1970).

13 In a criminal case the government must prove all essential
14 elements of its case beyond a reasonable doubt and therefore the
15 standard for entering a Judgment of Acquittal would seem properly
16 to be whether upon evidence viewed most favorably to the prose-
17 cution a reasonable jurer could fail to have a reasonable doubt
18 about the guilt of the defendant, and the fact that the evidence
19 is susceptible of different inferences is not enough, but it must
20 be sufficiently strong to banish all reasonable doubt. United
21 States v. Markowitz, 176 F.Supp. 681(1959).

22 On a motion for a Judgment of Acquittal, the Judge must con-
23 sider whether the facts from which the jury could have inferred
24 the defendants state of mind at the time he made allegedly per-
25 jurious answers were sufficient proved by direct evidence.
26 United States v. Bronston, 326 F.Supp. 469(1971), affd. 453 F.2d
27 555, reversed on other grounds 93 S. Ct. 595, 409 U.S. 352.

28 To determine a motion for Judgment of Acquittal, the Court

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1 must search the record and find whether there is sufficient
2 evidence from which it could be found that the essential elements
3 of the charges have been proven. United States v. Brooks, 349
4 F.Supp. 168(1972).

5 In determining sufficiency of the evidence to withstand a
6 motion for Judgment of Acquittal, the evidence and reasonable
7 inferences that may be drawn therefrom must be viewed in the
8 light most favorable to the government and, if under such a view,
9 it is concluded that a reasonable mind might fairly find guilt
10 beyond a reasonable doubt, the issue is for the jury; however,
11 if it is concluded that there must be some doubt in a reasonable
12 mind, the Motion for Acquittal must be sustained. United States
13 v. Collon, 426 F.2d 939 (1970).

14 In determining whether there exists a balance between guilt
15 or innocence, in ruling upon a motion for Judgment of Acquittal,
16 the Court may draw inferences from admitted facts, but inferences
17 upon inferences cannot be made. United States v. Harvard Dock
18 ... Wharf Co., 124 F.Supp. 337(D.C. Cal. 1954).

19 To deny a defendants Motion for Judgment of Acquittal in a
20 criminal case based upon circumstantial evidence, defendants'
21 guilt must be the only reasonable hypothesis from such evidence,
22 and if there is any other reasonable hypothesis, defendant is
23 entitled to such judgment, though guilt may also be a reasonable
24 hypothesis. United States v. Maghinang, 111 F.Supp. 760 (1953).

25 While all the government's evidence is accepted as true in
26 the application of the circumstantial evidence rule on a Motion
27 for Judgment of Acquittal, the Court may look to the defense
28 for purposes of ascertaining a reasonable hypothesis other than

1 against the weight of the evidence, the Court must act as a
2 thirteenth jurer and assess the credibility of the witnesses
3 and weight the evidence objectively; if the court reaches a con-
4 clusion that the verdict is contrary to the weight of the evidence
5 and that in this carriage of justice may have resulted, the verdict
6 may be set aside. United States v. Cara Mandi, 415 S. Supp. 443
7 (1976).

8 In ruling on a post trial motion for Judgment of Acquittal,
9 which asserted that the evidence was insufficient as a matter of
10 law to sustain a guilty verdict, all doubts of credibility are to
11 be resolved in favor of the Government. However, if the Court con-
12 cludes that a verdict is contrary to the evidence, or its weight,
13 and that in this character of justice may have resulted, verdict
14 may be set aside and a new trial granted, but such remedy is to be
15 sparingly used. United States v. Mancini, 396 F. Supp. 75 (1975).

16 In the case of United States v. Brooks, D.C. N.Y. 1972, 349
17 F.Supp. 168, the court enunciated what we view as a correct view
18 of law. There the Court essentially held that issues of credibil-
19 ity are jury questions not reached on motions for a judgment of
20 acquittal following a presentation of the evidence unless the
21 testimony is so in conflict or improbable as to be incredible as
22 a matter of law. We believe that the Government's evidence is
23 both so in conflict and improbable, and is so incredible, it must
24 be disregarded as a matter of law.

25 When you get to the bottom line of each and every allegation
26 set forth in the indictment in this particular case, you find
27 that the only evidence submitted against the defendants is that
28 of Fred PETERS, who is contradicted and refuted not only by his

1 own prior inconsistent statements, but almost each and every
2 Government witness who took the stand, much less the defense wit-
3 nesses. To begin with, we believe PETERS himself is an inherently
4 incredible witness. His background and history as developed by
5 evidence in this case show that throughout life he has engaged in
6 lies, in fraud, and deception. It began as early as his teenage
7 years when he fraudulently enlisted in the armed services of the
8 United States. It culminated with his faking his own death to
9 relieve himself of the burden of facing his former wife's charges
10 of incestuous relations with his daughter and fleeing to Los
11 Angeles, where he changed his identity and secured his job with
12 the Automation Institute by once again falsifying his resume and
13 lying to Mr. TOKESHI, who was then to employ him. Beyond that,
14 Fred PETERS is a convicted felon whose testimony must be viewed
15 with caution; was convicted of crimes of moral perpetitude, includ-
16 ing fraud, which means his testimony must be viewed with great
17 caution; and he has been granted immunity from prosecution for the
18 testimony he would give again requiring, as a matter of law, that
19 his testimony be viewed with great caution. So what we have in
20 this instant case is an entire chain of two conspiracies and
21 four substantive counts which to be proved, requires the belief
22 in the testimony and evidence of Fred PETERS beyond a reasonable
23 doubt. The belief in a witness who for three separate and dis-
24 tinct reasons must be viewed with caution as a matter of law, and
25 by background and history has proven himself a master of deceit.

26 If that weren't enough, each and every transaction about
27 which he testified revealed contradiction not only with other
28 Government witnesses in very material aspects, but with his own

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1 prior statements and testimony after becoming a Government witness.
2 To begin with, PETERS alleged in his interview on May 11, 1975
3 that his first solicitation for funds by Steve ELKO occurred at a
4 meeting in the Congressional Hotel immediately after the GODDARD
5 meeting in January or February of 1972 and that Mark GREEN, Daryl
6 FLEMING, ELKO and a southern gentlemen were all present. At that
7 meeting, according to PETERS' statement then, ELKO solicited "five
8 suits of long underwear" which he knew to mean \$5,000.00. There-
9 after, PETERS recounted he gave ELKO the \$5,000.00 in Daryl
10 FLEMING's office.

11 At the time of trial Fred PETERS changed his story and stat-
12 ed that his earlier encounters with ELKO in January and February
13 of 1972 produced no discussions regarding money at all. Then he
14 changed again at trial and recounted that those same meetings con-
15 tained discussions about expenses which he understood to mean pay-
16 ments to ELKO. When it came time to testify as to payment of that
17 alleged \$5,000.00, by the time of trial, PETERS no longer had us
18 in Daryl FLEMING's office but now inside a car picking him up at
19 the airport.

20 On the other hand, of course, as already pointed out in our
21 Statement of Facts, Daryl FLEMING, the other Government witness who
22 was allegedly present at all points during these conspiracies,
23 save the In-Tech check transaction, refuted PETERS' stories in
24 almost each and every material fact. Daryl FLEMING thrice testi-
25 fied that he never heard Steve ELKO directly solicit Fred PETERS
26 for money. And the only type of indirect solicitation he could
27 infer was ELKO's questioning of FLEMING himself alone as to what,
28 if anything, FLEMING was being paid and whether there was money in

1 it for FLEMING

2 Both in his F.B.I. interview and in his testimony at trial,
3 FLEMING denied ever hearing ELKO use the term "five suits of long
4 underwear" with respect to his conversations with PETERS.

5 Further, PETERS stated that the origin of the funds for the
6 \$5,000.00 bribe was money given to him in \$100 bills by TOKESHI.
7 TOKESHI, of course, vehemently denied ever giving PETERS that
8 money.

9 Further, PETERS' testimony has you believe that ELKO and
10 FLEMING picked him up during the day of May 7, 1972. He's
11 specific as to that date because, PETERS recalls, that following
12 his April 24th trip to Washington, he went back to Los Angeles
13 to explain to TOKESHI the necessity of \$4,000.00 or \$5,000.00
14 being given to ELKO, got that money from him, flew thence to WHAM
15 in Memphis, Tennessee for a May 6th meeting, and then on to
16 Washington on May 7, 1972. FLEMING himself recalls vividly, in
17 response to a question from the court, that it was daylight, and
18 yet the Government's own evidence as to that trip of Fred PETERS
19 shows he left Memphis, Tennessee at 6:05 P.M. and wouldn't have
20 arrived in Washington, D.C. until nighttime at 9:00 P.M. Neither
21 FLEMING nor PETERS can agree as to exactly what happened inside
22 the car, with FLEMING talking about extensive conversation and
23 ELKO viewing the envelope and the cash, while PETERS testifies as
24 to no conversation and ELKO quietly slipping the closed envelope
25 into his pocket.

26 PETERS completely changed his testimony from that of his
27 F.B.I. interview and would have us now believe that ELKO requested
28 the "five suits of long underwear", meaning the \$5,000.00, while

1 on a speaker ● one during a telephone conversation that PETERS had
2 with Daryl FLEMING.

3 While one can understand a variance in dates and time that
4 might be corrected when viewing documentary evidence and records
5 one had not seen, there are no documents and records that could
6 corroborate a reason for PETERS' change of mind as to where ELKO
7 solicited the money, whether it was in a meeting in a room or over
8 the telephone; there are no records or documents that PETERS could
9 have reviewed between his F.B.I. interview and the time of trial
10 that would have led him to determine whether he handed ELKO the
11 \$5,000.00 cash in FLEMING's office or in an automobile; there are
12 no records or documents that PETERS could have reviewed that
13 would have indicated to him whether Mark GREEN was present at a
14 meeting as he testified at a F.B.I. interview, or had absented
15 himself as he testified at the time of trial. Since FLEMING and
16 TOKESHI are Government witnesses, the Government is bound with their
17 denials and refutation of PETERS' testimony. The testimony regard-
18 ing this particular episode is too in conflict to be credible as a
19 matter of law. It's incredible as a matter of law because of the
20 inherent incredibility of Fred PETERS, and because of the numerous
21 conflicts on almost each material point raised by PETERS between
22 his testimony and his F.B.I. interview. It's inherently incredible
23 because of the conflict between the testimony on material matters
24 between prosecution witnesses themselves, and it is improbable as
25 a matter of law that Mr. ELKO, Mr. FLEMING and Mr. PETERS were
26 together during the day of May 7th as the Government alleges when
27 Mr. PETERS didn't arrive until that night, as the Government's
28 documentary evidence shows.

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1 The next episode in which Mr. PETERS once again is the sole
2 witness to try and establish evidence of a crime is the alleged
3 bribe of June 16, 1972. Here again, we have no one but PETERS
4 stating that ELKO received any money whatsoever while both
5 FLEMING and PETERS agree that PETERS gave FLEMING a check for
6 \$10,000.00, they disagree on almost everything that happened
7 thereafter.

8 According to PETERS, Daryl FLEMING kept the money in an
9 envelope until later at the alleged meeting at the Congressional
10 Hotel. According to FLEMING, he told PETERS, "It's your money;
11 you count it and keep it." They both agree that they went to
12 the Congressional Hotel later on that afternoon, about 4:00 or
13 4:30 P.M. as FLEMING placed it, but there again they both totally
14 disagree though both are supposed to be eyewitnesses to the same
15 event.

16 As it turns out, FLEMING denies he witnessed anything.
17 While PETERS states that he kept \$4,000.00 for himself, he gave
18 the \$4,000.00 to FLEMING to give to ELKO and gave \$2,000.00 to
19 FLEMING for himself. Thereafter, accordingly, FLEMING gave ELKO
20 the \$4,000.00 alleged bribe.

21 FLEMING denies all of it. FLEMING states that PETERS had
22 the money all the time and while he felt, that PETERS would take
23 some money out, and there was discussion of a \$4,000.00 In-Tech
24 loan, FLEMING denies that he gave ELKO anything. Instead, he
25 states that he went to the bathroom and when he came out he saw a
26 napkin with some figures on it he called a receipt which, conven-
27 iently, he later destroyed. But he denies seeing any money pass
28

1 at all that day except \$1,000.00 that was given to him. Again,
2 the prosecution's own testimony as to this particular overt act
3 of Count I of the indictment, and the substantive facts behind
4 Count II of the indictment, are so inherently in conflict and so
5 improbable as to be incredible as a matter of law. Added to that
6 is the testimony of three witnesses -- two eyewitnesses (COLLEY
7 and FLOOD) and two disinterested witnesses (COLLEY and MERLINE) --
8 and documentary evidence that demonstrates, most probably, that
9 San Francisco is where Mr. ELKO was at that time on that day. It
10 is therefore improbable that that offense occurred as described on
11 that date as a matter of law.

12 The third transaction which the prosecution described as a
13 bribe is perhaps the most incredible of all. Here again, we do
14 not have Daryl FLEMING as a witness. Daryl FLEMING denies any
15 knowledge of this transaction at all, except to corroborate Pat
16 BRISLIN's testimony that BRISLIN talked to PETERS about selling
17 some scripts, books or materials to PETERS on behalf of the In-
18 Tech Corporation. The only witness as to exactly what happened at
19 this event on behalf of the prosecution is who? Good old incred-
20 ible Fred PETERS. Now Fred PETERS, himself, actually does not say
21 that this is a bribe. PETERS, himself, says that BRISLIN had
22 shown him materials, books and some things about In-Tech, and
23 there was mention of \$15,000.00, but he isn't quite sure what the
24 explanation was. He then goes on to testify that on June 23, 1972,
25 he made out this check for \$15,000.00 to In-Tech to give to
26 people he believed could be helpful to him. This was his state of
27 mind. Even he does not testify that the defendants regarded it as
28 a bribe or inducement to do anything. All he described is what

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1 his motivation was. To characterize that this check was in some
2 form or fashion a bribe is incredible and improbable as a matter
3 of law. The prosecution would have us believe that FLEMING and
4 PETERS, who dealt in cash as a matter of habit, and who claim on
5 two previous occasions to have sat down with Steve ELKO in a car
6 and in a room, and sorted out thousands of dollars in \$100 bills
7 to disguise, mask and secrete the bribe of a public official, all
8 of a sudden would bribe that same official by a check made out on
9 a corporate account, made payable to another corporation, not only
10 signed but counter-signed, and impossible to convert into cash
11 without going through bank processes that document the transaction.
12 And all of these bribes are for an accreditation that did not take
13 place, for an extension of an eligibility that was afforded as a
14 matter of policy to all schools similarly situated, according to
15 the Government theory. And most incredible and improbable of all,
16 is the PETERS explanation that, while he was willing to drop
17 \$60,000 or more in the Sterling-Homes fiasco, while he was willing
18 to walk away from WHAM-T Corp. after dumping \$180,000 or more in
19 that enterprise, while all the money he was using he was stealing
20 anyway, he refused to continue his efforts with regard to accredit-
21 ation because ELKO wanted but \$25,000.00 more. Incredible and
22 improbable, as a matter of law, are those three incidents which
23 together are the objects of, and primary overt acts of, Count I of
24 the Indictment, constitute the substantive Counts II and III of
25 the Indictment, and the denial of which is the basis of the per-
26 jury Counts V and VI of the Indictment, and the motive for the
27 Conspiracy to obstruct justice set forth in Count IV of the
28 Indictment.

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1 Specifically, the May 7th alleged bribe and the June 16th
2 alleged bribe are the monies that ELKO denies receiving directly
3 or indirectly in Count V of the Indictment. The facts surrounding
4 the In-Tech Check transaction--there was no evidence and no allega-
5 tion that ELKO received any of the proceeds directly or indirectly
6 --as set forth by PETERS V. BRISLIN is the basis of the perjury
7 Count set forth in Count VI of the Indictment.

8 If those events above did not occur, at least in the manner
9 they were described, then of course the defendants have no motive
10 to cover up. And here again, the gravamen of the offense of the
11 cover up relies almost solely again on the contradicted testimony
12 of Fred PETERS. FLEMING testifies that ELKO calls PETERS to talk
13 to him about "the check that PATTY cashed for him meaning PETERS",
14 wholly consistent with what the defendants testified happened. It
15 is only PETERS who tells us that that is their version of the
16 story, and without saying it's untrue, would have you believe that
17 that's their attempt to cover up something else.

18 Once again, the discussion at the Hyatt House, where Daryl
19 and Louise FLEMING overhear ELKO and BRISLIN discussing and
20 recounting the facts of the In-Tech transaction, then four years
21 old, prior to their grand jury testimony, can lead logically to
22 one of two conclusions. The first conclusion is that here are two
23 people who do not want to place themselves in a position of being
24 accused of perjury by inconsistent testimony, and therefore are
25 reviewing the facts, then four years old, jogging their memories
26 and minds to try and determine the truth of what happened so that
27 their testimony will be both truthful and consistent. The other
28 interpretation, of course, is that these two targets of the grand

1 jury are coordinating their story in an untrue fashion to cover
2 up misdeeds of the past. Which is true FLEMING doesn't know.
3 When HINDIN asks him that probative question as to whether they
4 were in fact discussing different versions, FLEMING demurs and
5 says he doesn't know. So once again, one cannot convict on Count
6 VI of the Indictment unless one again believes the inherently in-
7 credible testimony of Fred PETERS.

8 With respect to Counts V and VI of the Indictment, again,
9 the only refutation to the fact that those are truthful statements
10 is the testimony of Fred PETERS. Count V of the indictment basic-
11 ally said ELKO lied when he denied taking money directly or in-
12 directly from PETERS or FLEMING, referring of course to the alle-
13 gations of the bribe in May and on June 16, 1972 (that testimony
14 would not refer to the In-Tech transaction where the money went
15 to In-Tech and/or Pat BRISLIN, no evidence having been produced
16 that any of it went to Steven ELKO). Count VI of the indictment
17 is, of course, Pat BRISLIN's version of what happened with the
18 In-Tech check; that it was given to her in the first place and
19 that she returned \$13,500.00 of it in cash to Fred PETERS. She
20 can only be convicted of that particular account if, once again,
21 you can believe the incredible testimony of PETERS beyond reason-
22 able doubt.

23 PETERS is so pathologically incredible, that he even
24 perjured himself at this trial on points upon which he was
25 questioned which weren't even material to the particular transac-
26 tion in question, but were posed to test credibility. For
27 instance, when asked whether or not he had reviewed with Mr.
28 TOKESHI the various loans and withdrawals he had made at

1 Automation Institute to make private investments in WHAM, INC.,
2 and other enterprises, he replied that of course he had, he was
3 certain he had. On the other hand, Mr. TOKESHI, when asked
4 specifically about those particular loan transactions, testified
5 that PETERS had never cleared them with him and that PETERS had
6 been untruthful with him. Again, TOKESHI is a Government witness
7 and the Government is bound by his testimony.

8 PETERS maintained that the first suggestion of spreading
9 money around came from FLEMING, who told PETERS that he would
10 have to do the same. However, FLEMING, the Government's witness,
11 denies that and states that it was PETERS himself who first stated
12 he was willing to spread money around and that he, FLEMING, never
13 made that statement.

14 PETERS specifically denied that he had falsely told people
15 that he was a Congressional Medal of Honor Winner, as the Senate
16 investigators had reported in their investigation. And yet,
17 PETERS was flatly contradicted by John WILLINGHAM of the WHAM-T
18 CORPORATION, a disinterested witness, who vividly recalled that
19 Fred PETERS had told him, along with the WHAM-T board, that he
20 was a Congressional Medal of Honor winner, being personally given
21 the medal by Harry S. Truman. In fact, WILLINGHAM recalled, it
22 was finding out through his Congressman that that statement of
23 PETERS was not true that caused him to first suspect Fred PETERS'
24 character.

25 In summary, therefore, what we have is a six count indict-
26 ment based on the exclusive representations and allegations of
27 Fred PETERS. Each and every one of those allegations has been
28 refuted in part or in whole by the other Government witnesses in

1 the case, as well as the defense witnesses. Mr. PETERS' own back-
2 ground is that of a pathological liar, cheat, and man devoid of
3 all truth. He has a strong motive to lie in that he has been
4 granted immunity from prosecution for all of his criminal activity
5 about which he testified which, as a result of this trial, extends
6 to almost all his activities between 1972 and the time of his in-
7 carceration in 1977. Beyond his background showing a propensity
8 to lie, his conviction of a crime which shows in fact he's a man
9 of low moral turpitude, the fact that he has a strong motive to
10 lie, the evidence has also shown that at this trial he in fact
11 did lie, and that almost each and every prosecution witness has
12 testified in conflict with, and refuted PETERS' testimony. The
13 court as a matter of law must rule that his testimony is so in con-
14 flict and improbable as to be incredible as a matter of law. That
15 being the case, there is insufficient evidence, then, upon which a
16 conviction can be had in any of the six counts charged in this
17 indictment.

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1 AS TO DEFENDANT ELKO, SPECIFICALLY
2 AS TO COUNTS, I, II, III, IV, AND V, OF THE
3 INDICTMENT, THERE WAS INSUFFICIENT EVIDENCE
4 AT TRIAL TO SUPPORT THE GUILTY VERDICT THEREON.

5 Count II of the indictment, which is also set forth as an
6 overt act, and objective, of Count I of the indictment alleges in
7 substance that ELKO induced Fred PETERS on or about June 15, 1972
8 to travel to Los Angeles from Washington, D. C. for the purposes
9 of giving ELKO the bribe alleged to have taken place at the Con-
10 gressional Hotel on June 16, 1972. The Government must prove
11 that in fact ELKO induced PETERS to travel from Los Angeles to
12 Washington on that day for that purpose. It would not be suffic-
13 ient to prove that after having arrived in Washington, that
14 FLEMING and PETERS decided to bribe ELKO and that ELKO therein
15 decided to accept said bribe to prove Count II of the indictment.
16 There must be some evidence, some showing, as the clear language
17 of the Count itself states, that the interstate travel of PETERS
18 was, among other things, for the specific purpose of bribing ELKO,
19 and that ELKO induced him to do so before the act of traveling.
20 According to the Statement of Facts, there was no testimony, or
21 any evidence whatsoever, that on or about June 15, 1972, ELKO in-
22 duced PETERS to come to Washington at all, much less induced him
23 to come to Washington for purposes of the alleged bribe of June 16,
24 1972. In fact, PETERS did travel to Washington from Los Angeles
25 on or about that date. The evidence does show that he made out a
26 check to Daryl FLEMING, who thereafter cashed that check and re-
27 turned the cash to Fred PETERS. The evidence as set forth by both
28 FLEMING and PETERS then demonstrates that they went to the
Congressional Hotel. But as stated in the Statement of Facts,

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1 thereafter their testimony is completely contradictory with PETERS
2 alleging facts absolutely denied by FLEMING. FLEMING testifying
3 in essence that he never received the money back from PETERS, as
4 PETERS alleges; FLEMING denying that he ever handed the \$4,000.00
5 to ELKO as PETERS alleges, and in fact FLEMING alleging that he
6 never saw any money transacted or exchanged that day except for
7 the \$1,000.00 that he himself received from PETERS. That is the
8 Government's evidence and they are bound by it, to wit, FLEMING's
9 testimony that he was unaware of any bribe occurring that day at
10 all. Only PETERS gives us some testimony of a bribe, but there
11 again, even he doesn't claim that he gave the \$4,000.00 to ELKO
12 but that he gave it to FLEMING, who in turn gave it to ELKO, which
13 of course, FLEMING denies. Notwithstanding the contradictory
14 testimony as to whether or not a bribe even occurred and the strong
15 suggestion by the Government's own evidence that it did not,
16 neither PETERS nor FLEMING testified to anything other than that
17 being a spontaneous act occurring on that day. There was no
18 testimony in the transcript that Steve ELKO, whom the evidence
19 showed to have been in Pennsylvania on the 15th of June and in
20 San Francisco, California on the 16th of June, ever induced Fred
21 PETERS to come to Washington on or about that date for any purpose
22 whatsoever, much less bribery.

23 The same problem exists with Count III of the indictment,
24 wherein it is alleged that ELKO induced on or about June 28, 1972,
25 PETERS to fly from Los Angeles to Washington for the purposes of
26 bribery, to wit, the In-Tech of \$15,000.00, which PETERS claims he
27 gave to ELKO. The problem with the Government's case, again, is
28 that there was no testimony or evidence whatsoever that in fact

1 on or about the date ELKO induced PETERS to come to Washington
2 for the purposes of bribery or to come to Washington whatsoever.
3 In fact, PETERS' own testimony was that he decided to do this nice
4 thing for people who could be good for him. It was a manifesta-
5 tion in his own mind that induced him to carry a check from Los
6 Angeles to Washington, D.C. on or about June 28th. Apparently,
7 according to the testimony of Daryl FLEMING and the evidence in
8 this case, the inducement for PETERS to come to Washington from
9 Los Angeles on or about June 28, 1972 was to meet with FLEMING,
10 Red MOUNTAIN, James R. JONES, TOKESHI and others at the Rotunda on
11 June 29, 1972 to discuss the passage, and the implications thereof,
12 of the emergency \$200 million Appropriations Bill for the relief
13 of Agnes disaster victims. As the evidence shows, that meeting
14 was held, and the concern on that happy night was the purchase of
15 Sterling -- Homex stock which they expected to be a bonanza to all
16 of them by the sale of its inventory, through Congressman Flood,
17 to the flood victims in the Wyoming Valley of Pennsylvania,
18 following the Agnes disaster. According to the evidence, specif-
19 ically PETERS' own testimony, it was quite fortuitous that he
20 decided at that point in time to also bring with him to Washington,
21 D.C. on that day a check made payable to the In-Tech Corporation
22 which he alleged he thereafter gave to ELKO. Again, the induce-
23 ment by ELKO, as aided and abetted by BRISLIN, for PETERS to come
24 from Los Angeles to Washington for that purpose of a bribe is an
25 essential element of the offense which the Government failed to
26 prove either as to Count III or as to that Count as expressed in
27 Count I as an overt act.

28 Again, we have a problem that in both Counts II and III the

1 only incriminating evidence is the uncorroborated, refuted and con-
2 tradictory testimony of Fred PETERS, and again submit that his
3 testimony must be viewed as inherently incredible.

4 The argument with respects to Count II and III, of course,
5 carry over to Count I of the indictment, that the evidence is
6 entirely insufficient to prove that there was any conspiracy to
7 commit bribery.

8 In terms of the objective of the conspiracy to interfere and
9 defraud the Office of Education, again we have a huge gap between
10 the Government's theory and the Government's proof. While we all
11 recognize that the Government's theory was that ELKO, by signing
12 Congressman Flood's name to the letters that were transmitted to
13 the Office of Education, by using the strong and flowery language
14 that he did, and by addressing the situation solely to the West
15 Coast Trade Schools, was corruptly trying to interfere with the
16 impartial determination of eligibility by the Office of Education
17 and its delegee, NATTS. However, the problem of the Government's
18 theory is that it was contradicted by the witnesses the Government
19 called to establish that theory. The principal witness, of course,
20 was DR. FULLER of the Commissioner's staff. I believe it is sig-
21 nificant to point out that the two witnesses who could have in
22 fact testified as to whether their decisions were unduly influenced
23 and interfered with in a manner inconsistent with ELKO's official
24 duties were not called by the Government, to wit, former
25 Commissioner of Education MARLIN and Mr. PROPHIT of the Office of
26 Education. Instead, the Government tried to establish that the
27 Commissioner's decisions were changed or somehow corruptly inter-
28 ferred with by calling two of their aides. However, as mentioned

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1 before, DR. FULLER did not sustain the Government's position and
2 the Government is bound by his evidence. His evidence was that he
3 knew, and the Commissioner's staff knew, that this was basically a
4 staff-to-staff transaction between ELKO and the Commissioner's
5 staff; that they knew and were aware that it was usual for a
6 Congressman's staff to sign the Congressman's name and to draft
7 his letters, and that they also knew that, while the language con-
8 tained in those letters was unusual for a Congressman, it was
9 quite consistent with the type of language that emanated from
10 Congressman Flood and his office. Therefore, one must infer for
11 the Government's own evidence quite the opposite of the Government's
12 theory, that they regarded these letters as the usual and
13 legitimate types of communications that would come from Congress-
14 man Flood's office if concerned about a particular problem in an
15 agency which came within his committee's jurisdiction. On the
16 other hand, Ruth CROWLEY was called by the Government to voice her
17 opinion that the apple cart, in effect, was upset by ELKO's letters
18 to the Commissioner and that it interfered with a standard and a
19 policy set five years previously by another Commissioner of
20 Education. The problem with CROWLEY's testimony was it was
21 speculation on her part. She admitted that she had never talked
22 to FLOOD's office, and she had never talked to Congressman Flood
23 or to Steve ELKO, she did not know whether PROPHIT had discussed
24 the matter with the Commissioner of Education before issuing the
25 decision in his name, and she herself had no discussion with the
26 Commissioner's office. While showing the natural bureaucratic
27 tendency to resent the fact that the Commissioner of Education,
28 Mr. PROPHIT, her superior, exercised decision making powers and

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1 authority that had been delegated in part to her, she had to admit
2 also that they had such authority and it was within the purview of
3 their responsibilities. While it was the Government's original
4 contention that this extension of eligibility until NATTS could
5 consider the problem of accreditation was unique to the West Coast
6 Trade Schools, on cross-examination CROWLEY confirmed that this
7 privilege was extended to all schools within that class, exactly
8 the end result that congressman Flood testified he hoped to
9 accomplish using the West Coast Trade Schools as test case.
10 Apparently, while the Government and defense lawyers can well
11 recognize using a particular case to set a precedent of law, the
12 Government seems oblivious to the fact that Congressmen do the
13 same in setting precedents within the agencies under their juris-
14 diction. CROWLEY thereafter continued to testify that once NATTS
15 had made a decision on the West Coast Trade Schools, and several
16 other schools, that Flood's office withdrew their interest, that
17 the eligibility of the West Coast Trade Schools continued to be
18 extended, as well as that of other schools, beyond the period that
19 Flood's office indicated any interest in the matter. That belies
20 the Government's theory that that policy was specifically carved
21 out for the West Coast Trade Schools, or any other trade schools,
22 only because of Congressman Flood's interest. So while the con-
23 spiracy to defraud the Government by interfering with OE was an
24 interesting theory in Count I of the indictment, unfortunately, it
25 was refuted by the very witnesses the Government called to sustain
26 it, and therefore quite obviously, the evidence is insufficient to
27 sustain a conviction on that theory of Count I of the indictment.

28 With respect to Count IV of the indictment, which alleges

1 conspiracy by M ELKO and Miss BRISLIN to obstruct justice, again
2 we find a wide gap between the Government's theory of the case, the
3 allegations of the indictment, and the proof that came to bear at
4 the time of trial. With respect to the overt act of the famous
5 phone call from Steve ELKO to Fred PETERS on or about October of
6 1975, we find that quite to the contrary of an admission, ELKO
7 when asking for Fred PETERS, told Daryl FLEMING he wanted to talk
8 about the check that PATTY cashed for FRED. That, of course, was
9 quite consistent with BRISLIN's testimony as to having received
10 the check herself from PETERS and thereafter returning \$13,500.00
11 to him, as the subject matter of Count VI of the indictment, where
12 in she is charged with lying to the grand jury by having stated
13 those facts.

14 The second event upon which the Government relied to demon-
15 strate that the co-conspirators were trying to merge their stories,
16 and lie to investigators, was the famous episode in February of
17 1976 when FLEMING testified that he played his I.R.S. and F.B.I.
18 interviews, along with a portion of his Senate interview for the
19 defendants prior to their April, 1976, grand jury appearance and
20 they then dupliated the same. As it later turned out, of course,
21 those interviews, save the Senate interview, took place in June
22 and July, 1976, after the defendant's April grand jury testimony
23 for which the defendants are indicted for perjury. It is quite
24 obvious, then, that that evidence is insufficient to show that
25 they used those tapes to prepare their testimony for the grand
26 jury and to conspire to lie therein. In terms of the Senate
27 testimony, FLEMING was also forced to admit that he really didn't
28 have a tape of the complete Senate interview, but only a portion

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1 of it, actually less than half. What, if any, utilization that
2 could be to the co-conspirators in obstructing justice never was
3 brought out at the time of the trial, and how, and what, factual
4 importance it had was lost because of the insufficiency of the
5 evidence regarding the other two tapes.

6 Thereafter, the Government turned its attention to the famous
7 Hyatt House meeting, where they would have you believe that the
8 defendants sat around concocting a story to tell the grand jury,
9 sepcifically with respect to the In-Tech check. The problem with
10 the Government's theory is, again, it is not supported by the
11 evidence. While they got Daryl FLEMING to testify to a banter
12 between ELKO and BRISLIN to their best recollection of the facts
13 surrounding an event four years previous, when the golden question
14 was asked of Mr. FLEMING as to whether or not they were discussing
15 different versions of the story, presumably as opposed
16 to trying to sort out the true facts, FLEMING cleverly demurred
17 and stated he couldn't answer the question. Speculation, of
18 course, is not evidence. A demurrer that he didn't know, of
19 course, is not evidence. There are no other witnesses except
20 Louise FLEMING. And all she could add to the conversation is it
21 appeared to her, too, that they were discussing different facts
22 about the same circumstances, and it was her guess that they were
23 trying to concoct a story for the grand jury. It was her impres-
24 sion, although she could give us no basis for that impression,
25 having been neither a witness to that specific event, nor having
26 been involved with any of these people during the time of the first
27 alleged conspiracy. All louise FLEMING could add to the case was
28 a subservient wife serving her husband by appearing as a witness

1 on the stand, as she had when she and Daryl FLEMING and Fred
2 PETERS, journeyed on her honeymoon to sell forklift wheels to the
3 KELLOGG COMPANY. The bias she demonstrated against Pat BRISLIN,
4 who had been close to DARYL's second wife, CAROLYN, is evidenced
5 in her testimony. To support her belief that the story was being
6 concocted, as opposed to the innocent interpretation of memories
7 being refreshed, was her incredible account of BRISLIN telling her
8 that she was going to testify before the grand jury that the
9 receipt she received back from Fred PETERS on June 30, 1972 was
10 washed away by the Agnes disaster which, as we know, occurred on
11 June 22, 1972. And of course, BRISLIN never did so testify before
12 the grand jury.

13 If Count II of the indictment is not supported by sufficient
14 evidence, then, of course, Count V also must fall as being not
15 supported by sufficient evidence. For Count V essentially
16 charges ELKO with perjury for denying the allegations set forth in
17 Count II as alleged in the indictment. I would like to point
18 out that it is the defendant's position that Count V of the indict-
19 ment is directly related to Count II and possibly the overt act
20 of May 7, 1972, which I shall address in one moment. The trans-
21 action set forth in Count III, the In-Tech check, which Pat
22 BRISLIN deposited into the In-Tech account and from when she later
23 took \$13,500.00, is a transaction where the money, according to
24 the proof of trial did not go beyond Pat BRISLIN. As Mr. HINDIN
25 stated to the court, beyond Pat BRISLIN, they have no evidence as
26 to where the money went or for what it was used. Therefore, of
27 course, that particular transaction could not sustain a perjury
28 count against ELKO for denying the receipt of funds from FLEMING

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1 or PETERS.

2 With respect to the transaction that PETERS alleged took
3 place in late April or May of 1972, though his direct examination
4 testimony would infer that he also believed it took place in May,
5 again we have a situation where the contradictory and confusing
6 evidence produced by the Government's own witnesses is inherently
7 incredible and certainly insufficient to sustain a conviction. We
8 have witnesses who cannot agree as to what happened on that oc-
9 casion and the Government is bound by the apparent confusion and
10 conflict of its own witnesses destroying the sufficiency of their
11 evidence. PETERS testified that the origin of the money that was
12 later to be placed in an envelope and supposedly reached ELKO's
13 pocket was Mr. TOKESHI, who gave him that amount in \$100 bills
14 between the time that PETERS came back to Los Angeles from his
15 April 24th trip to Washington and the time he went to Memphis,
16 Tennessee for WHAM board meeting and thereafter flew into
17 Washington on May 7, 1972. TOKESHI, sepcifically denied that he
18 ever gave Fred PETERS any such money. TOKESHI is a Government
19 witness who himself testified under a grant of immunity from
20 prosecution. FLEMING was certain that the event took place in the
21 daytime in direct response to a question by the judge, PETERS
22 himself knew this happened on the day of May 7, 1972, and yet the
23 Government's own exhibit, the ticket of Fred PETERS from Memphis,
24 Tennessee to Washington, D.C. on that date, shows that he left at
25 6:05 P.M. and would not arrive in Washington, D.C. until 9:00 that
26 night. Defendants' exhibit G demonstrates that not only was that
27 ticket issued but the boarding pass included thereon demonstrates
28 beyond a reasonable doubt, along with PETERS' own testimony, that

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1 conspiracy cannot be established. Dennis v. U.S., 302 F.2d 5 (1962).
2 Ergo, it is clear the "...person does not become a conspirator un-
3 less he knows of the existence of the conspiracy, agrees to be-
4 come a party, and with that knowledge commits some act in further-
5 ance thereof." U.S. v. Falcone, 311 U.S. 205 (1961).

6 In considering this motion for Acquittal, the standard to be
7 applied is the same standard used by appellate courts in review:
8 the evidence is viewed in the light most favorable to the
9 Government, and, gauged thereby, is deemed or not deemed suffi-
10 cient to justify a jury verdict of guilt beyond a reasonable doubt.
11 Goff v. U.S., 466 F.2d 623 (1971).

12 On a motion for judgment of acquittal the trial court must
13 consider whether the facts from which the jury could have infer-
14 red the defendant's state of mind at the time he made allegedly
15 perjurious answers were sufficiently proved by direct evidence.
16 U.S. v. Bronston, 326 F. Supp. 469 (1971).

17 Summarizing the relevant case law, the Court after trial
18 herein, instructed the jury in Jury Instruction Seven, as proposed
19 by the Government, as follows:

20 "One may become a member of a conspiracy without
21 full knowledge of all the details of the conspiracy.
22 On the other hand, a person who has no knowledge of
23 the conspiracy, but happens to act in a way which
24 furthers some object or pupose of the conspiracy, does
25 not thereby become a conspirator. Before the jury may
26 find the defendant has become a member of the
27 conspiracy, the evidence must show beyond a reasonable
28 doubt that the conspiracy was knowingly formed and
the Defendant willfully participated in the unlawful
plan with the intent to advance or further some object
or purpose of the conspiracy."

A Motion for Judgment of Acquittal should be granted when it
is clear that the evidence which would justify the jury in finding
any single element of an offense charged beyond reasonable doubt

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1 that was the flight he took. In summary therein, the defendants
2 believe that the court should not be guided by the Government's
3 theory of the case, as apparently the jury was, but what evidence,
4 if any, there is to substantiate that theory. And that evidence,
5 is insufficient to sustain a verdict of guilty as to all counts
6 of the indictment, as to all defendants.

7 4. AS TO DEFENDANT BRISLIN, SPECIFICALLY, AS TO
8 COUNTS I, III, IV, AND V OF THE INDICTMENT THERE WAS
9 INSUFFICIENT EVIDENCE AT TRIAL TO SUPPORT THE GUILTY
10 VERDICT THEREON.

11 As set forth by the Summary of Testimony on pg. 17, both
12 PETERS and FLEMING testified that BRISLIN was not present at any
13 of the discussions or exchanges of money, and evidenced no know-
14 ledge of ELKO's accreditation efforts for PETERS. At that time,
15 in contrast to the period of the alleged cover-up, she was not
16 living with ELKO as if married, but was merely a girl friend and
17 former business associate.

18 The only cover-up acts alleged by the Government against
19 BRESLIN occur several years later, too remote in time to infer an
20 admission or consciousness of guilt on or about the time of the
21 offense to infer "present intent" required for scienter.

22 The evidence presented at trial as Counts One and Three of
23 the indictment failed to establish the necessary element of
24 Scienter or intent.

25 It is implicit in a charge of conspiracy to violate a crimin-
26 al law that the elements of knowledge and intent be shown to exist.
27 U.S. v. Mishkin, 317 F. 2d 634 (1963); Schnautz v. U.S. 263 F. 2d
28 525 (1959).

Without proof of knowledge, intent to participate in a con-

1 is lacking. U.S. v. Shafer, 384 F. Supp. 496 (1974).

2 If a reasonable doubt is inherently posited in the Govern-
3 ment's case as to the Defendant's intent, a necessary element of
4 the offense, then the judge must grant the motion for acquittal.
5 U.S. v. Wing, 302 F. Supp. 1247 (1969); U.S. v. Melillio, 275 S.
6 Supp. 314 (1967).

7 On each charge against the Defendant, the evidence is fatally
8 insufficient to establish guilt beyond a reasonable doubt. As
9 already set forth in Section 3, above, of this Argument, Counts IV
10 and VI of the Indictment can only be upheld as to BRESLIN if the
11 inherently incredible testimony on the issue of the In-Tech
12 check can be believed beyond a reasonable doubt. We submit that
13 it cannot as a matter of law.

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1 5. A NEW TRIAL HEREIN WOULD, IN FACT, BE
2 IN THE INTEREST OF JUSTICE IN THAT THE VERDICT
3 WAS (a) NOT SUPPORTED BY SUFFICIENT EVIDENCE:
4 NOR (b) CONSISTENT WITH THE WEIGHT OF THE EVIDENCE.

5 When there are grounds for a Motion for a new trial because
6 either the verdict is contrary to the weight of evidence, or not
7 supported by substantial evidence, the Court should be guided by
8 the "interest of justice" alone. United States v. Neff, 343 F.
9 Supp. 978 (1972).

10 If there is a reasonable probability that there has been a
11 miscarriage of justice, a Motion for New Trial should be granted.
12 United States v. Smith, 179 F. Supp. 684 (1959), cert. dem. 364
13 U.S. 938 (1959).

14 If the prosecution fails to prove any essential element of
15 any count the defendant is entitled to a new trial. Where, in a
16 prosecution for making threats against the President, the jury
17 was permitted, via the instructions, to convict the defendant
18 without a finding that the threat was made with a present intention
19 to do injury to the President, reversal and a new trial were re-
20 quired. United States v. Patillo, 431 F. 2d 293 (1970). In the
21 instant case, the prosecution has put on no evidence (See state-
22 ment of Facts) indicating that defendant BRISLIN had a present
23 intention to form or join a conspiracy or do an unlawful act in
24 the year 1972 in question.

25 A motion for a new trial on the grounds of asserted lack of
26 evidence to support a verdict is addressed to the sound discretion
27 of the Court. United States v. IV Cases of Slim-Mint Chewing Gum,
28 300 F. 2d 144 (1962).

On a motion for a new trial on the grounds that the verdict

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1 is against the weight of the evidence, the Court may weigh the
2 evidence and consider the credibility of witnesses, and if it
3 reaches the conclusion that the verdict is contrary to the evidence,
4 and that a miscarriage of the justice may have resulted, the
5 verdict may be set aside and a new trial granted. United States
6 v. Robinson, 71 F. Supp. 9 (1947); See, also United States v.
7 Joines, 327 F. Supp. 253 (1971); United States v. Hurley, 281 F.
8 Supp. 443 (1968).

9 The Court may set aside the verdict as contrary to the weight
10 of the evidence and grant a new trial even if there was substantial
11 evidence requiring him to submit the issues to the termination of
12 the jury. See United States v. Robinson, supra.

13 A Federal Trial Judge has the power and the duty to grant a
14 new trial if the verdict is on such insufficient evidence as
15 would warrant a new trial in the interest of justice. United
16 States v. Frank Feld, 103 F. Supp. 48 (1952).

17 As stated in the Summary of Facts, PETERS specifically
18 testified that BRISLIN was not present during any of the discus-
19 sions where it is alleged that ELKO solicited money--and of
20 course FLEMING denied that ELKO had ever solicited money from
21 PETERS -- and that she was not present when any of the bribe
22 transactions occurred. Further PETERS testified that he neither
23 overheard nor discussed with BRISLIN anything from which he could
24 infer she had any knowledge of ELKO's accreditation efforts.
25 PETERS also testified, as did FLEMING, that BRISLIN and PETERS
26 talked alone about In-Tech transactions which PETERS characterized
27 as loans, though he was unclear as to the discussion about
28 \$15,000., while FLEMING confirmed that they talked about PETERS

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1 purchase of some scripts, books and materials among other things.
2 FLEMING likewise disassociates BRISLIN from any act, dis-
3 cussion or knowledge of the conspiracy charged in Count One of the
4 Indictment, and has no knowledge as to Count III. Clearly there
5 is insufficient evidence, and it is certainly against the weight
6 of the evidence, for a jury to convict BRISLIN of Count One of the
7 Indictment, and of Count III of the Indictment. For even if one
8 believes PETERS account of the In-Tech Check transaction, there
9 was still no evidence that BRISLIN knew of any quid-pro-quo with
10 regard to accreditation alleged as to ELKO, nor that she knew of
11 PETERS motive to "help the people who could be helpful to me".
12 The mere fact that at that time she was ELKO's girlfriend, (they
13 were not yet living together as if husband and wife), alone cannot
14 infer or impute knowledge. Nor can one impute knowledge and
15 scienter for acts alleged to have occurred in 1972 even if you
16 believe that BRISLIN, several years later, when living with ELKO
17 as if married, assisted him in covering up acts he was alleged to
18 have committed. It's too remote, and cannot be considered as an
19 admission or consciousness of guilt at the time of the acts.

20 As outlined in Sections 3 and 4 above, the evidence is much
21 too insufficient to allow the verdict of the jury to stand with
22 regard to any of the Counts as to any of the defendants, if not
23 for the purposes of a judgment of acquittal, at least for a new
24 trial. And certainly, the verdict of the jury requires at least
25 a new trial as against the weight of the evidence.

26 The weight of the evidence, as set forth in the above sum-
27 mary of the evidence (pp 5-27) clearly shows that on about
28 April 16, 1972, PETERS and FLEMING clearly had lost faith in the

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1 ability of AUTOMATION INSTITUTE to obtain accreditation for the
2 West Coast Schools--remembering that Automation itself was
3 accredited. The weight of the evidence infers that the \$10,000.00
4 "house loan" was a down payment consulting fee to FLEMING, dis-
5 guised as a loan to avoid payment of taxes on it as income, to
6 find other enterprises in which PETERS, FISCHER and CARMEN could
7 invest the funds they could divert from Automation Institute.
8 They would set up such vehicles as Group II and Group III Equities
9 as separate corporation from the Institute. The weight of the
10 evidence, and FLEMING's own testimony, refuting PETERS, was that
11 at that time they involved RED MUNTAIGN at HUD for the purpose of
12 investing in businesses in the housing area that were potential
13 recipients of federal housing and construction funds from that
14 agency, rather than continue with the HEW bureaucracy where they
15 had no friends (PETERS incredibly testified that MUNTAIGN was not
16 involved with he and FLEMING in housing matters, but with the
17 funding of FISL paper.)

18 The weight of the evidence, and the testimony of FLEMING
19 and WILLINGHAM, shows that PETERS came to Washington on April 24,
20 1972, not to discuss long underwear with ELKO and accreditation
21 with FLMEING, but to discuss with FLEMING, MUNTAIGN and WILLINGHAM
22 investing in WHAM Inc. to the tune of \$250,000 of Automation
23 Institutes money, with a commitment of \$25,000 good faith money
24 to be paid on May 6, 1972, at the board presentation to WHAM. The
25 weight of the evidence is that PETERS invented the cover story
26 for TOKESHI's benefit that he needed that \$25,000, \$5,000 per
27 school," to bribe ELKO and FLOOD for accreditation purposes, and
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1 decision on the merits is reached, especially where the welfare of
2 minority students--attending schools that had been directly rated
3 as eligible by OE and had depended on such funding for more than
4 ten years, was at stake.

5 The weight of the evidence clearly shows that consistently
6 all that FLOOD's office, and ELKO, requested was that the proper
7 considerations procedures, as already required by regulation were
8 followed by OE, or imposed on its delegee NATTS in the administra-
9 tion of programs under the jurisdiction of the Subcommittee of the
10 Congress of which FLOOD was chairman, such that vocational schools
11 already eligible under OE loan guarantee programs not lose such
12 status until NATTS, or OE, made an accreditation decision on the
13 merits. The evidence conclusively showed that the policy of ex-
14 tending eligibility to already funded schools with accreditation
15 applications pending was extended to all schools so situated, not
16 just the West Coast Trade Schools. The evidence also conclusively
17 shows that once a decision on the merits of the West Coast Trade
18 Schools had been reached by NATTS, even though adverse, FLOOD's
19 office, and ELKO specifically, withdrew any interest.

20 The weight of the evidence clearly shows that the purpose and
21 inducement for PETERS' trip to Washington, D. C., on June 15-16,
22 1972, was to confer with FLEMING and MONTAIGN about his new post
23 as a board director of, and President of, WHAM Inc, and deliver to
24 FLEMING the final \$10,000.00 for a total of \$25,000.00 representing
25 the rest of the 10% finders fee for the \$250,000 loan to WHAM
26 convertible into stock. The weight of the evidence shows that
27 none of that money reached ELKO, as claimed, for the weight of the
28 evidence is that ELKO was nearly 3,000 miles away at the time at

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1 then took that same amount and made that downpayment to WHAM.

2 The weight of the evidence shows that the real purpose for
3 which PETERS flew to Washington, D. C., was to meet FLEMING and to
4 brief him in on the WHAM board's reception to this presentation,
5 and to meet again with FLEMING and WILLINGHAM, as FLEMING's Diary
6 and WILLINGHAM's testimony demonstrate, on May 8. The evidence
7 shows that PETERS did not arrive on the 7th of May until 9:00 p.m.
8 at night. The weight of the evidence suggests that PETERS gave
9 the \$5,000.00 to FLEMING in his office as a finder's fee payment
10 on May 8 at his 9:30 appointment, as he had earlier told VOGEL dur-
11 ing his FBI interview, and it is improbable that money ever reach-
12 ed ELKO. The weight of the evidence is that ELKO was in
13 Pennsylvania on May 7, 1972, as JONES and BRISLIN testified, and
14 the gas receipts in evidence suggest, and did not return to
15 Washington D.C. until late on May 8, 1972, as disinterested witness
16 WILLINGHAM confirms. It was thus impossible, or at least improb-
17 able, that he drove to the airport during the day of May 7, 1972 to
18 pick up PETERS before PETERS could have physically arrived, and
19 accepted the \$5,000 bribe in the car as testified to by PETERS at
20 trial.

21 The weight of the evidence is that on that same trip, to
22 document and maintain PETERS' cover story to TOKESHI, and to
23 justify further diversions of Automation Institute funds to
24 housing enterprises, FLEMING and PETERS enlisted ELKO and FLOOD's
25 assistance in the form of letters which could be shown to TOKESHI,
26 in obtaining accreditation for the West Coast Trade Schools. They
27 were confident they would obtain the same because of the merit in
28 the principal that eligibility should not be cut off until a

1 the AMA convention in San Francisco, California, making arrange-
2 ments for Congressman FLOOD's appearance.

3 The weight of the evidence clearly shows that the purpose of
4 PETERS' trip to Washington, D.C., and the inducement to come there
5 by traveling in interstate commerce, was not in response to ELKO,
6 but in response to a call from FLEMING to attend a dinner and meet-
7 ing at the Rotunda with himself, MUNTAIN, JAMES R. JONES, and
8 others, because of the eminent passage of the \$200,000,000.
9 Emergency Relief Bill for victims of the June 22, 1972, Agnes
10 disaster. The evidence conclusively shows that meeting was held,
11 and that following the same \$60,000 worth of stock was purchased
12 by PETERS in Sterling-Homex Corporation, manufacturers of pre-fab
13 modular housing, and that all anticipated huge profits by the
14 selling of the Sterling-Homex inventory to flood victims in
15 Pennsylvania, and elsewhere. They hoped, and expected the help
16 of ELKO and FLOOD. The conclusive evidence is that they did not
17 get that help, did not obtain the government contracts for
18 Sterling-Homex and WHAM that they had expected, and thereby were
19 left standing holding the bag, having diverted more than \$200,000
20 from Automation Institute for those enterprises, with no way of
21 restoring those funds.

22 The weight of the evidence then shows, that PETERS, hopeless-
23 ly in trouble, again, again changed his name and fled to Arizona
24 with another quarter-of-a-million dollars of the company money.
25 The evidence then shows that he and FLEMING, using that base, en-
26 gaged over the next four years in a series of enterprises which
27 involved criminal activity for which FLEMING and PETERS now have
28 immunity for prosecution in exchange for their testimony, and

1 about which FLEMING is currently providing information to the
2 Department of Justice in Washington, D.C.

3 The weight of the evidence is that when the Senate began to
4 investigate the West Coast Schools, and PETERS was arrested on the
5 passport violation, he instinctively and immediately, did the
6 popular and acceptable thing, and tried to buy his freedom by mak-
7 ing allegations against a public official, a Congressman, unnamed.
8 The weight of the evidence then goes on to show, as FLEMING so
9 testified, that after PETERS was bailed out of jail they discussed
10 the fact that the Justice Department was anxious to grant immunity
11 in exchange for allegations against public officials. The evidence
12 shows that notwithstanding the investigations then pending, PETERS
13 and FLEMING felt secure enough to continue their schemes and scams
14 until PETERS' incarceration in 1977.

15 The weight of the evidence shows that all of the acts of ELKO
16 and BRISLIN between 1975 and 1977 were the natural acts of a
17 public official, and his common-law wife, trying to determine what
18 exposure, if any, the investigations around PETERS might create
19 for them; realizing that mere guilt by association in the press
20 and public eye is harmful to a public official.

21 The inquiries being made, even by the manner in which the
22 questions were asked -- ELKO's request to talk to PETERS about the
23 check Patty cashed for him -- show innocence of mind and of action.
24 The weight of the evidence is that ELKO and BRISLIN were refresh-
25 ing their memories at the HYATT HOUSE meeting, prior to thier
26 grand jury appearance of April, 1976, just as FLEMING testified
27 he and his wife did subsequently when making appearances. BRISLIN
28 was clear in her testimony that all she and ELKO were doing is

1 avoiding the possibility of being accused of perjury by making in-
2 consistent and erroneous statements of facts due to lapse of
3 memory over the period of four years that had passed. FLEMING
4 could not, and did not when pointedly asked the question by HINDEN,
5 refute that interpretation, he demurred.

6 The weight of the evidence shows that the defendants did not
7 encourage anyone to lie or obstruct justice, and not one prosecu-
8 tion witness testified that either of the defendants did so en-
9 courage them, in fact upon inquiry admitted that the defendants
10 had not.

11 The weight of the evidence, as outlined before, demonstrates
12 that the alleged bribes of May 7, 1972, and June 16, 1972 did not
13 take place, so that ELKO did not perjure himself as set forth in
14 Count V of the Indictment when denying that he had received such
15 monies from either PETERS or FLEMING.

16 The weight of the evidence shows that neither of the
17 defendants knew or understood the purchase of the In-Tech materials
18 by PETERS, and the later cashing of the check, to be a bribe with
19 the money going to In-Tech or BRISLIN, and that BRISLIN was tell-
20 ing the truth, as opposed to the uncorroberated testimony of PETERS
21 in her account of what happened. The weight of the evidence does
22 not, therefore, sustain a conviction of Count VI of the Indictment
23 against BRISLIN.

24 The weight of the evidence shows that FLEMING and PETERS con-
25 cocted the whole criminality of the story as alleged in Counts I
26 through VI of the Indictment, sometimes manufacturing facts, some-
27 times taking innocent acts and giving them unseemly appearances,
28 for the purposes of buying their freedom. They knew that because

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1 they had earlier used the same cover story of bribes to ELKO and
2 FLOOD to extract funds from TOKESHI, the government would find
3 their story credible, and by handing to the Justice Department
4 prosecutors headline-making prosecutions of public officials, the
5 Justice Department would find the trade desirable. Besides, the
6 officials PETERS and FLEMING would, and did, point their finger
7 at to escape punishment for most of their criminal activities, were
8 the very ones who disappointed them by turning down their housing
9 contracts and thus deprived them of the expected resulting finan-
10 cial bonanza which would have made them wealthy, and allowed them
11 to pay back to Automation Institute the funds they had diverted,
12 and thus avoided criminal culpability. Thus vengeance and oppor-
13 tunity for freedom from prosecution presented themselves at the
14 same moment, when within a single month, May 1977, both FLEMING
15 and PETERS made deals with the government, gave interviews regard-
16 ing this case to the FBI, and without much further interview or
17 investigation, the Government obtained an 11th hour Indictment a
18 week-and-a-half later, June 8, 1977.

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1 6. A NEW TRIAL HEREIN WOULD IN FACT BE IN THE
2 INTEREST OF JUSTICE IN THAT THE COURT OUGHT TO HAVE
3 SUSTAINED DEFENDANTS OBJECTIONS TO THE GOVERNMENT
4 PROPOSED INSTRUCTIONS AND TO THE MANNER IN WHICH
5 THE JURY WAS CHARGED.

6 A review of the Government's proposed special jury instruc-
7 tions, as submitted in the instant proceeding, reveals a staccato
8 like repetition of things such as the elements of the crime of
9 conspiracy (See for example and compare Government Instructions
10 No. 4 with number 28) or that of bribery (See and compare Govern-
11 ment's Instructions No. 12 and 23, for example), and so forth.

12 This approach to persuasion is well known to those who practice
13 the art of propaganda: "The big lie" -- if you say it long
14 enough, often enough, it will be believed. C.F., Dictionary
15 of American Slang, Wentworth and Flexner, Page 35 (1967). In a
16 less strident voice, James Conant puts it thusly:

17 Some of mankind's most terrible misdeeds have been committed
18 under the [constant chatter!] of certain magic words and
19 phrases.

20 A study of the last volume of the transcript clearly mani-
21 fests defendant's objections to this "machine gun" approach. To
22 these objections the Court seemingly agreed. See Volume 9. But
23 then, despite the Court's assurances that the Government's spec-
24 ial instructions would be trimmed and expurgated to mellow what
25 might otherwise be a cacophony, the Court went on to charge the
26 jury in the manner objected to. It is therefore, submitted that
27 the jury was thus more convinced by the repeated hammerings of
28 the Government's special instructions than by the evidence. A
new trial, therefore, seems in order; for, having assured counsel
that these instructions would be pared, but then not doing so, it

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1 would seem that the wide discretion of the Court in effecting
2 justice upon a motion for a new trial ought to be exercised now
3 for the benefit of defendants:

4 The verdict should be set aside and a new trial granted
5 if the Court reached the conclusion that a miscarriage
6 of justice has resulted. [U.S. v. Parelius, 83 F. Sub.
7 617 (D.C. Hawaii 1949).]

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1 the instant Indictment, there are some allegations as to
2 time and place in the Indictment that could not have been
3 so explained. Let's address ourselves, by example, to Count
4 2 of the Indictment, which is also an overt act in Count 1.
5 FLEMING received two \$10,000.00 checks in the Spring of 1972,
6 one on April 14, 1972 (See Exhibit 7), and one on June 16, 1972,
7 (See Exhibit 14.) Both are drawn on Automation Institute and
8 made payable to FLEMING, both were cashed by FLEMING in Washington
9 D.C. According to PETERS FBI interview (Exhibit T), the first
10 mention, and only mention, of a \$10,000.00 check is to FLEMING
11 for a "house loan", from which proceeds the \$4,000.00 bribe
12 set forth in Count 2 and Count 1 would be derived (Pg. 5, Ex.T).
13 In his FBI interview, FLEMING recalls the \$10,000.00 check as
14 being around June, 1972, but he too only talks about one \$10,000.
15 check giving us no clue as to whether it was the first or second
16 one he cashed from which it is alleged he gave ELKO \$4,000.00.
17 PETERS traveled to Washington, D.C. on both occasions, FLEMING
18 cashed the checks in Washington on both occasions. There is
19 no document that we are aware of or evidence that could have thus
20 been used before the grand jury that would lead them to believe
21 other than PETERS version in the FBI interview that he gave a
22 \$10,000.00 house loan to FLEMING that was to be "repaid" by giving
23 the proceeds to ELKO and FLOOD, which would have meant the April
24 \$10,000.00 check for which FLEMING gave PETERS a Note reflecting
25 it as a house loan. Had the Grand Jury picked that check, however,
26 it could not have charged it as the statute of limitations had
27 passed, while by alleging the check of June 16, 1972, the could
28 beat the five (5) year statute by seven (7) days.

1 Now, whether our theory, which we believe can reasonable be infer-
2 red from those facts, that the attorneys for the government chose
3 to have the Grand Jury indict on the alleged distribution of
4 one of the \$10,000. checks using the June 16, 1972, date to
5 avoid the statute of limitations, and thereafter FLEMING and
6 PETERS conformed their testimony to that date supplied by the
7 government to "cooperate," not because that date was true, is
8 correct or not is a factual question that should have gone to
9 the jury. It goes to the heart of the question as to the
10 credibility of the only two percipient witness to the crimes
11 alleged, both of whom have strong motives to "cooperate" with the
12 government's desire to prosecute the defendants, both of whom
13 have a lot to lose if they do not. A fair trial cannot be had
14 without the jury considering whether the testimony of these
15 witnesses was not in fact framed by the government for them, and
16 the Court erred in not allowing Counsel to pursue that subject
17 and place that issue before the jury.

18 A defendant who was convicted of wire fraud primarily on the
19 testimony of two witnesses whose testimony had been induced by
20 a hope held out by the prosecuting attorney that the cooperation
21 would be considered by the Court in acting on the indictments
22 against them, was entitled to a new trial on the grounds that he
23 had been denied due process. Hawkins v. The United States, 324
24 F.2d 873(1963).

25 The Court, in Hawkins, makes reference to the United States
26 Supreme Court case of Napue v. Illinois, 360 U.S. 264(1959).

27 The Hawkins court states, inter alia, "the vice which the
28 Napue case, supra, sought to eradicate was the suppression of

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1 facts from the jury, from which the jury might have concluded that
2 the witnesses had fabricated testimony in order to curry favor
3 with the representatives of the state ...", at page 377.

4
5 CONCLUSION

6 Because of the inherent incredibility of the probative
7 government witnesses, and the incredibility and conflict of the
8 government's evidence on almost all material facts, coupled with
9 in many cases the physical impossibility or improbability of the
10 occurrence of some of the events, the defendants are entitled
11 to a Judgment of Acquittal on all counts because of the insuffic-
12 iency of the evidence.

13 Certainly, they are at least entitled to a new trial on the
14 insufficiency of the evidence, and without a doubt a new trial is
15 mandated because the weight of the evidence acquits the defendants.

16 Because of the number of Counts alleged, and the complexity
17 of the case, the jury was destined anyway, perhaps, to be confused
18 by the evidence. But the situation was not reduced by the assign-
19 ment's of error, already discussed, which while at the time may
20 not have seemed vital, have now been shown to have prejudiced the
21 defendants in the conduct of this trial, and a new trial is the
22 only remedy to cure should the Motions for Judgment of Acquittals
23 not be granted.

24
25 Dated: November 5, 1977

Respectfully submitted,
ORIGINAL SIGNED

ALAN M. MAY

ORIGINAL SIGNED

VALERIE CAVANAUGH

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
PLAINTIFF(S)

CASE NUMBER

CR 77-739 (ALS)

VS

STEPHEN ELKO, PATRICIA BRISLIN,

PROOF OF SERVICE

DEFENDANT(S)

I, the undersigned, certify and declare that I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, State of California, and not a party to the above-entitled cause. On November 5, 1977 I served a true copy of Motion for Judgement of Acquittal and/or new trial

by personally delivering it to the person(s) indicated below in the manner as provided in FRCivP 5(b); by depositing it in the United States Mail in a sealed envelope with the postage thereon fully prepaid to the following: (List names and addresses for person(s) served. Attach additional sheets if necessary.)

DAVID HINDEN, Esq.
Assistant United States Attorney

I hereby certify that I am a member of the Bar of the United States District Court, Central District of California. *

I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. *

Subscribed and sworn to before me



Signature of person making service

ALAN M. MAY, Esq.

*Document must be notarized only if neither of these certifications is applicable.

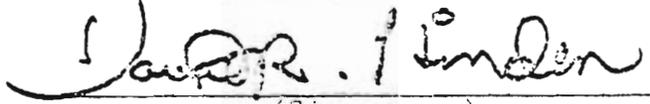
(Date)

Notary Public in and for the County of _____
State of California.

(Seal)

ACKNOWLEDGMENT OF SERVICE

I, DAVID HINDEN, received a true copy of the within document on November 15, 1977, 1977.



(Signature)

DAVID HINDEN, Esq.

for: the United States of America
(Party served)

1972 CALENDAR

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December 20, 1977

MEMORANDUM TO: Marge Emmons

FROM: William C. Oldaker

SUBJECT: MUR 464

Please withdraw from circulation the General Counsel's First Report on MUR 464.

Thank you.

December 20, 1977

MEMORANDUM TO: Marge Emmons
FROM: Elissa T. Garr
SUBJECT: MUR 464 Team #3 Johnson

Please have the attached 7 Day Report distributed to the Commission on a 24 hour no-objection basis.

Thank you.

E.G

I would like to see what went up as I have not finished the 7-day Report yet.

Randy

12/20

2:59 PM

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MUR 464

Johnson

PS Form 3811, Apr. 1977

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

● SENDER: Complete items 1, 2, and 3. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one)
- Show to whom and date delivered
 - Show to whom, date, and address of delivery
 - RESTRICTED DELIVERY
Show to whom and date delivered
 - RESTRICTED DELIVERY.
Show to whom, date, and address of delivery
- (CONSULT POSTMASTER FOR FEES)

2. ARTICLE ADDRESSED TO:

*Mr David Hayden
312 N. Spring
Los Angeles, CA*

3. ARTICLE DESCRIPTION:

REGISTERED NO.	CERTIFIED NO.	INSURED NO.
	<i>943065</i>	

(Always obtain signature of addressee or agent)

I have received the article described above.

SIGNATURE Addressee Authorized agent

G. Gault

4. DATE OF DELIVERY *FEB - 6 1978* POSTMARK

5. ADDRESS (Complete only if requested)

6. UNABLE TO DELIVER BECAUSE: CLERK'S INITIALS



FEDERAL ELECTION COMMISSION

1325 K STREET N.W.
WASHINGTON, D.C. 20463

February 2, 1978

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. David Hinden
Assistant United States Attorney
United States Courthouse
312 N. Spring
Los Angeles, California

Re: CR-77-739ALS

Dear Mr. Hinden:

As you suggested in a telephone conversation with Randall Johnson of this office, we contacted John Dowd at the Department of Justice here in Washington for a copy of the memorandum reportedly made public by the Department regarding "campaign contributions" made by George Young to Stephen Elko while Mr. Elko was working for Rep. Daniel J. Flood. Mr. Dowd checked his files and told me that he does not have a copy of that memorandum.

Since then we have tried to reach you several times by telephone but have been told that you are involved in a lengthy trial. We again request a copy of the Department's memorandum which has reportedly already been made public, and any other materials which may be relevant to these "campaign contributions."

Thank you.

Sincerely,

William C. Oldaker
General Counsel



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ALAN M. MAY
JOHN Y. TREMBLATT
VALERIE A. CAVANAUGH

October 20, 1977

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OF COUNSEL

MICHAEL E. SOMERS
JOHN LAURICELLA

JOHN LAURICELLA
690 MARKET ST., # 1400
SAN FRANCISCO, CALIFORNIA 94104
TELEPHONE: (415) 986-5206

To E for file

[REDACTED]

Re: U.S.A. v. Elko, Brislin
CR 77-739, USDC, Cent.D.Cal.

Dear [REDACTED]

This is to confirm in writing my representation to you as to the status of the above captioned case.

The jury found both defendants, Mr. Elko and Ms. Brislin, guilty of all counts charged in the indictment, notwithstanding the fact that we proved that on several occasions they weren't even in Washington, D.C. on dates that occurrences allegedly transpired in that city; on one such date we produced witnesses, a photograph, and a registration card that showed Mr. Elko to be at the A.M.A. Convention in San Francisco.

As a result, the judge did more than entertain the proforma motions for a new trial and a judgment of acquittal. He denied the government's request to set, as is customary, a date for sentencing and to refer the defendants to the probation department for the purposes of beginning a presentence report. Instead he continued them on their current bond and set the date of November 7, 1977, to hear the defendants motions for the Court to exercise its authority under Rule 29 of the Federal Rules of Criminal Procedure to enter a judgment of acquittal, notwithstanding the jury's verdict (the jury has been dismissed). He invited defense counsel to submit the same in writing prior to that date, along with any motions for a new trial. He indicated that his mind was open to doing the same. A judgment of conviction, needless-to-say, was not entered. So, I believe it is fair to state that the trial, in essence, goes on to argument and and final verdict by the Court--a Court trial.

I hope this representation will clarify for you the unusual status of the above proceedings, again, notwithstanding any newspaper reports of what they believe is transpiring.

Sincerely yours,

Alan M. May

Alan M. May, Esq.

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WASHINGTON
Post

Nov. 1, 1977

To E. Gove
Open as a

MUR -
assg to Johnson

80010172833

Hill Aide Reported Paid \$25,000 by Businessman

A former administrative assistant to Rep. Daniel J. Flood (D-Pa.) received \$25,000 in cash from a New Jersey businessman in exchange for helping obtain government contracts for a vocational school in Wilkes-Barre, Pa., in 1972, according to a Justice Department memorandum made public in Los Angeles.

The allegations were filed at the start of an unrelated bribery trial in which the former Flood aide, Stephen Elko, and an associate, Patricia Brislin, were convicted two weeks ago in U.S. District Court in Los Angeles.

According to the Justice memo, New Jersey businessman George Young, developer of a computerized training device for vocational schools, said he gave \$25,000 in cash "campaign contributions" to Elko in the Bahamas and watched the congressional aide and Brislin "secreted the cash in money belts in order to bring it back to the U.S."

The cash was given in exchange for help in securing vocational school financing from the departments of Labor and Health, Education and Welfare, the memo alleged. Flood is chairman of the House Appropriations subcommittee for those departments.

A spokesman for Flood said yesterday that the Pennsylvania congressman "does not even know George Young," and said a search of the campaign records turned up no indication of such a contribution.

Elko, who left Flood's staff in June, 1976, and Brislin were convicted two weeks ago in federal court in Los Angeles on charges of soliciting and receiving approximately \$25,000 in bribes in exchange for using the influence of Flood's office to obtain accreditation for federally funded trade schools on the West Coast. They have not been sentenced.



FEDERAL ELECTION COMMISSION

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